Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHAEL D. STRICKLAND
Petitioner

v.

RICHARD DANZIG, Secretary of the Navy, VICE ADMIRAL DANIEL T. OLIVER, Chief of Naval Personnel, COMMANDER RICHARD LOTH, Commanding Officer, Special Boat Unit Twenty-Two, LCDR R. E. MILLER, Officer in Charge, Personnel Support Detachment
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

John B. Wells
LA bar #23970
Attorney for the Petitioner
317 Portsmouth Drive
Slidell, LA 70460-8429
504-641-1855
504-649-1536

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fifth Circuit Erred in Dismissing Petitioner's Appeal for Failure to Exhaust Administrative Remedies.

II. Whether the Fifth Circuit Erred in Denying Injunctive Relief As Moot When Relief Would Mitigate the Damage Suffered By the Petitioner.

III Whether the Fifth Circuit Erred In Denying Relief In Light of Petitioner's Right to Due Process.

IV. Whether the Navy Can Arbitrarily and Capriciously Discharge Petitioner.

V. Whether the Navy Can Discharge Petitioner When the Decision Is Unsupported by Substantial Evidence.

VI. Whether the Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs.

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BASIS FOR JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on Certiorari. The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 9th, 2000. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

CORPORATE DISCLOSURE STATEMENT

This document has not been filed on behalf of a nongovernmental corporation within the scope of Rule 29.6

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The following constitutional provisions treaties, statutes, ordinances and regulations re applicable to this proceeding:

5 U.S.C. § 704

5 U.S.C. § 706

10 U.S.C. § 890

10 U.S.C. § 1169

10 U.S.C. § 1552

Fla. St. § 800.03

Fla. St. § 800.04

Florida Rule of Criminal Procedure Rule 3.670

32 C.F.R. Pt. 41 App. A

32 C.F.R. 700.802

SECNAVINST 1910.4B

MILPERSMAN

Pertinent text of citations are set out in the appendix.

STATEMENT OF THE CASE

For seventeen years, petitioner, Gunners Mate First Class Petty Officer Michael Strickland was an exceptional sailor in the United States Navy. While stationed aboard the *USS Spruance* (DD-963), in March 1998, petitioner was arrested by the Jacksonville Beach Police Department for lewd, lascivious or indecent assault or act upon or in the presence of a child. (Fla. St. § 800.04) The arrest occurred after petitioner shook sand out of his shorts on a beach after dark one evening in an area he thought was protected from public view.

Mr. Strickland consulted with his superior who then discussed the case with a representative of Navy JAG. Based on assurances that the Navy would take no action against him, petitioner plead *nolo contendere* to a misdemeanor charge of indecent exposure on July 10, 1998. (Fla. St. § 800.03). Adjudication of guilt or innocence was withheld pursuant to Florida Rule of Criminal Procedure Rule 3.670

and he was placed on probation for one year..

The Commanding Officer was ordered by higher authority to process petitioner for administrative separation and on December 9, 1998 he appointed an administrative board to consider whether petitioner committed misconduct and whether he should be retained in the naval service. The next day an administrative board was held pursuant to the Military Personnel Manual (MILPERSMAN) to consider petitioner's case. By a unanimous vote, the administrative board found that the evidence did not support the basis for separation by reason of a civilian conviction and that petitioner should be retained in the naval service. (R. 58)[1]. The Commanding Officer of the *USS Spruance* (DD 963) concurred with the findings and recommendations of the administrative discharge board.

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[1] At the urging of the government representative, known as the recorder, the board after announcing findings changed their decision to indicate that Strickland had committed misconduct because of a civilian conviction.

On or about January 25, 1999 petitioner transferred to the Special Boat Unit Twenty-Two. In May of 1998, without notice to the petitioner or his Commanding Officer, the Bureau of Personnel submitted the package to the Assistant Secretary of the Navy for Manpower and Reserve Affairs arguing that the decision of the field commanders and operational officers be set aside. Papers submitted to the Assistant Secretary were not provided to Strickland as required by regulations. The Secretary ordered petitioner discharged from the Navy for misconduct with a general discharge under honorable conditions.

Petitioner filed the instant action on June 24th, 1999, and a Temporary Restraining Order (TRO) was granted by the district court on June 25, 1999. The TRO was extended on July 26, 1999 until August 9, 1999. On October 29, 1999, defendants-appellees filed a Motion to Dismiss under Federal Rules of Civil Procedure Rule 12(b)(6) or in the Alternative For Summary Judgment. Petitioner filed an opposition and

Cross-Motion for Summary Judgment on November 4, 1999. On January 14, 2000, the court granted respondent's Motion to Dismiss or in the Alternative for Summary Judgment and denied petitioner's Cross-Motion for Summary Judgement. On January 20, 2000, petitioner filed a request for stay in the District Court which was later denied.

This case is related to the case of *Konwinski v. Dalton,* which is also before this Court on a petition for *certiorari*. As in the instant case, Konwinski was discharged despite the findings of an administrative discharge board and the recommendations of two Commanding Officers. Several of the questions for review in this case are the same or similar to the questions submitted in the *Konwinski* case.

ARGUMENT

I. The Fifth Circuit Erred in Dismissing the Appeal for Failure to Exhaust Administrative Remedies

The enabling statute for the Board for Correction of Naval Records (BCNR), 10 U.S.C. § 1552, allows but does

not require the Secretary to correct records. The BCNR and other correction boards were established primarily to relieve Congress of the need for submitting private bills to correct injustices in military records. *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974), *on reh'g*, 505 F.2d 857, *cert. denied* 421 U.S. 1011. Present or former military members have complete discretion as to whether they would request relief. Nothing in the statute or the legislative history indicates a Congressional intent for these boards to constitute a preliminary step before requesting judicial review.

The exhaustion requirement was judge made law rather than statutory law. *Ballenger v. Marsh*, 708 F.2d 349. (8th Cir. 1983); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *Mindes v. Seaman* 453 F.2d 197 (5th Cir. 1971). Some courts argued that this requirement was discretionary. *Rolles v. Civil Service Commission*, 512 F.2d 1319 (D. C. Cir. 1975), *Ogden v. Zuckert*, 298 F.2d 312, (D.C. Cir. 1961). Additionally, a myriad of exceptions

have grown out of the case law which excused the exhaustion requirement including: (1) the remedies do not provide an opportunity for adequate relief; (2) the petitioner will suffer irreparable harm if compelled to seek administrative relief; (3) an administrative appeal would be futile; or (4) substantial constitutional questions are raised. *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir.1980).

The military itself has recognized the lack of statutory basis for requiring an application to the BCNR. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, 1994-SEP ARMY LAW. 3, 8 (Sep. 1994). The Department of Defense (DOD) has considered three proposals to amend Title 10 of the United States Code to require military personnel to seek relief from the service correction boards prior to requesting judicial review. *See*, Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix for Darby v. Cisneros*, 1997-FEB ARMY LAW. 3 (Feb. 1997). They included a mandatory

exhaustion requirement in their proposed Military Personnel Review Act of 1997. *See*, Chapman, *The Military Personnel Review Act of 1997*, 1997-MAY ARMY LAW. 74 (May 1997).

Absent Congressional action, a court cannot create a mandatory exhaustion requirement. It is well settled that courts must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Congress has enacted mandatory administrative remedies. (ie. Board of Veterans Appeals, Merit Systems Protection Board, etc.) They did not do so for military correction boards, even when DOD asked them to do so in 1997.

The United States Court of Federal Claims, who often reviews BCNR does require an application to the correction boards. *West v. United States*, 35 Fed. Cl. 226, 230 (1996); *Heisig v. United States*, 719 F.2d 1153, 1155 (Fed.Cir.1983).

The doctrine of exhaustion of administrative remedies has undergone close judicial scrutiny. More specifically, this

Court has ruled that when the Administrative Procedures Act (APA) is invoked, and the relevant statute does not specifically mandate exhaustion, federal courts can not require a plaintiff to exhaust available administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

It is undisputed that the APA applies to the type of proceedings in question. *Nicholson v. Brown*, 559 F.2d 639 (5th Cir. 1979); *Phillips v. United States*, 910 F.Supp. 101 (E.D. NY 1996). Petitioner has repeatedly invoked the APA. Under *Darby*, an agency administrative appeal is only required when the agency adopts a rule mandating an appeal before judicial review and ensuring that the initial decision would be "inoperative" pending appeal. 5 U.S.C. § 704, *Darby*, 509 U.S. at 152. Here, the decision to discharge petitioner was executed. Accordingly, it was a final action under *Darby*. Nor is there any military exception to *Darby*. *St. Clair v. Secretary of the Navy*, 970 F.Supp. 645, 648 (C.D. Ill 1997).

Courts have almost uniformly applied *Darby* to the military arena. *Dowds v. Clinton*, 18 F.3d 953 (D.C.Cir. 1994). *Perez v. United States*, 850 F.Supp 1354, 1360 (1994). *Watson v. Perry*, 918 F.Supp 1403, 1411 (W.D. Wash. 1996). *But see*, *Saad v. Dalton*, 846 F.Supp 889 (1994).[2] One military commentator indicated that the current state of the law is that *Darby* controls in the military context. *See* Barto, *supra*. 1994-SEP ARMY LAW. at 3.

Absent a requirement to submit a petition to the BCNR, the exhaustion of the BCNR remedy is not required. The Fifth Circuit erred in dismissing the appeal based on the exhaustion doctrine. In doing so they disagreed with the law in force in the Federal and District of Columbia Circuits. Pursuant to Rule 10(a), this matter is appropriate for certiorari. Additionally, the Fifth Circuit has conflicted with

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[2] In *Saad* the Administrative Procedures Act (APA) was not invoked by the plaintiff. The cased turned on equal protection grounds.

this Court's rulings in *Darby, supra.* to the extent that review is proper under Rule 10(c).

II. The Fifth Circuit Erred in Denying Injunctive Relief As Moot When Relief Would Mitigate the Damage Suffered By the Petitioner

Although the district court denied that the harm was irreparable, the Fifth Circuit found that because the harm was irreparable petitioner's claims were moot. This, of course, begs the question as to whether or not petitioner suffered irreparable harm.

This action was brought under the APA to review the arbitrary and capricious actions of the agency that were unsupported by substantial evidence and in violation of the Constitution and laws of the United States and the agency's own regulations. Pursuant to 5 U.S.C. § 706, the courts had the power to fashion an appropriate remedy including returning petitioner to active duty with back pay and allowances. It is true that some harm cannot be corrected. Petitioner will have an unexplained hole in his record that can

be expected to generate speculation on the part of promotion boards. He will not be assigned to another Special Warfare command such as a Special Boat Unit. He will probably never make Chief Petty Officer. This will permanently impact his retirement pay and future career plans.

Action by the courts can mitigate these damages, however. Currently, petitioner has been tossed onto the street without pay and allowances, separation pay or the possibility of retirement. He has been deprived of a lifetime of medical and dental care as well as other privileges. Returning him to active duty would allow him to regain these benefits and partially mitigate the irreparable harm that has befallen him.

Federal courts have jurisdiction to review military discharge proceedings to determine whether an official acted outside of the scope of his powers. *Harmon v. Brucker*, 355 U.S. 579 (1958). Federal courts may also review those decisions for fairness and reasonableness. *Van Bourg v. Nitze*, 388 F.2d 557 (D.C. Cir. 1967). They routinely review

cases in which it is alleged that the military services have failed to follow their own rules, regulations, policies, or procedures. *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978); *Rucker v. Secretary of the Air Force*, 702 F.2d 966 (11th Cir. 1983); *Sargisson v. United States*, 913 F.2d 918, 921 (Fed. Cir. 1990). Issues concerning discharge procedures are matters of compliance with the law and their review is a judicial responsibility. *Holley v. United States*, 124 F.3d 1462 (Fed. Cir. 1997).

Here the Fifth Circuit is in conflict with a number of other Circuits including the 9th, 11th, District of Columbia and Federal Circuits. Accordingly a review under Rule 10(a) is warranted Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Harmon, supra.* to the extent that review is proper under Rule 10(c).

III. The Fifth Circuit Erred In Denying Relief In Light of Petitioner's Right to Due Process

The trial court denied petitioner's significant

Constitutional claims. This is in contrast to the well settled proposition that violations of the Constitution are justiciable. *Wigginton v. Centracchio*, 205 F.3d (1st Cir. 2000); *Mullally v. United States*, 95 F.3d 12 (8th Cir. 1996); *Padula v. Webster*, 822 F.2d 97 (D.C.Cir.1987); *Dillard v. Brown*, 65 F.2d 316 (3rd Cir. 1981).

Review under the due process clause of the Constitution is limited to those instances where the plaintiff can demonstrate a liberty or property interest. In this case, Petty Officer Strickland has both.

A liberty interest in governmental employment is implicated if the individual's good name, reputation, honor or integrity are at stake, or if the governmental action could impose a stigma or other liability that could prejudice other employment opportunities. *Perry v. FBI*, 781 F.2d 1294, 1300 (7th Cir. 1986). Petitioner's reputation and good name were placed at stake. The discharge certificate (DD-214) indicates that plaintiff's separation was a General discharge

for "Misconduct." Additionally, the separation is sufficient stigma to invoke a liberty interest. *Casey v. United States* 8 Cl.Ct. 234 (1985). *See also, Perez v. United States,* 850 F.Supp 1354 (N.D. Ill. 1994)., *Milas v. United States*, 42 Fed. Cl. 704 (1999), *aff'd* 217 F.3d 854 (Fed. Cir. 1999).

Petitioner also enjoys a property interest in his naval career. Property rights in government benefits, including employment benefits, are based on statutory eligibility. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court held that statutory entitlement can trigger a property interest under the due process clause. A "legitimate claim of entitlement" was determines if a property interest existed. *Board of Regents v. Roth, 408 U.S. 564, 577 (1972).*

Petty Officer Strickland has an absolute right to due process of law. In *May v. Gray*, 708 F.Supp. 716 (E.D. N.C. 1988), the court relied on 10 U.S.C. § 1169 to distinguish the "at will" status of active duty officers and inactive reservists to find that an active duty regular enlisted member has a

Constitutionally recognized property interest and legitimate claim of entitlement to his or her job. *See also, Perez, supra. But see, Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991) and *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir 1984).

In *United States v. Gansemer*, 38 M.J. 340, 341 (C.M.A. 1993), the Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) found that "[w]ith regard to administrative-discharge procedures, a servicemember is afforded many due process protections, mostly spelled out in service regulations but having their foundation in the Constitutional principle that no person may be deprived of property without due process of law." 38 M.J. 341. The military court also noted that, pursuant to 10 U.S.C. § 1169, an administrative discharge must be based on appropriate authority. *Id.*

Once it has been established that the due process clause attaches to petitioner 's case, the next step is to

determine what process is due. The Supreme Court has held that at a minimum, there must be notice and an opportunity to be heard. In *Goldberg, supra*, Justice Brennan held that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Goldberg*, 397 U.S. at 270. *See, also, Greene v. McElroy*, 360 U.S. 474 (1959).

One of the more draconian actions taken against Strickland was the proceeding held by the secretary which reversed the findings of the administrative discharge board and the two operational Commanding Officers. These deliberations were taken in a vacuum without allowing the applicant to review, contest or refute the basis of the findings.

The MILPERSMAN required that petitioner be given copies of the documents forwarded to the Secretariat. This would have partially met the minimum due process

requirements of providing the petitioner notice. The Navy's refusal to provide Strickland with a copy of the memorandum forwarded to the Secretary of the Navy was a breach of due process as well as their own regulations. *Holley v. United States*, 124 F.3d 1462, 1469-70 (Fed. Cir. 1997).

Notice and an opportunity to be heard at a meaningful time and in a meaningful manner are essential elements of due process. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 315 (5th Cir.1997). Here Strickland was not notified that his board was reversed. This deprived him of the opportunity to present his case to the Assistant Secretary.

It is fundamental to our system of jurisprudence that the defendant has a right to defend himself or herself. Here, the defendant was effectively re-tried and found guilty without an opportunity to present any evidence on his behalf. Instead, his fate was decided in what can only be described as a modern day Star Chamber without even a record of the proceedings or deliberations.

Here Fifth Circuit deprived Strickland of proper judicial review of his Constitutional and statutory questions. In doing so they disagreed with the law in force in the First, Third and Eighth Circuits and the military court of last resort. Per Rule 10(a), this matter is appropriate for certiorari. Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Greene*, *Goldberg* and *Board of Regents, supra.* to the extent that review is proper under Rule 10(c).

IV. The Secretary of the Navy Cannot Arbitrarily and Capriciously Discharge Petitioner from the United States Navy

It is well settled in the jurisprudence of this Court and the other Appellate Circuits that an agency cannot act arbitrarily and capriciously in performing their functions. *Motor Vehicle Mfrs Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Santa Fe Energy Products Co. v. McCutcheon*, 90 F.3d 409 (10th Cir. 1996). A court must ascertain the facts on which the agency

made its decision, determine whether those facts have some basis in the record and judge whether a reasonable decision maker could respond to the facts as the agency did. *Recording Industry Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1 (C.A.D.C. 1981). The Court must also determine whether the agency's decision was based on the consideration of relevant factors and whether there was a clear error of judgment. *Virginia Agr. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89 (4th Cir. 1985). *See also, O'Keefe's Inc. v. U. S. Consumer Product Safety Com'n*, 92 F.3d 940 (9th Cir. 1996). In the instant case, the Secretary acted arbitrarily and capriciously in discharging petitioner.

In the instant case, it was Navy representatives who induced Strickland to agree to a plea bargain. It is arbitrary and capricious and fundamentally unfair to induce someone to enter a plead of *nolo contendere* to a criminal matter with assurances that they will not be administratively separated and then administratively separate them for entering that plea.

Administrative discharges based upon erroneous legal advice are arbitrary and capacious and cannot stand. *White v. Secretary of the Army*, 878 F.2d 501 (D. C. Cir. 1989). *See also, Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)

Additionally, the Secretary acted improperly in discharging petitioner based on a civilian conviction because petitioner was not convicted. Adjudication of guilt or innocence was withheld pursuant to Florida Rule of Criminal Procedure Rule 3.670. Strickland neither plead guilty nor was he convicted by a jury. He plead *nolo contendere*. With a *nolo* plea and no jury conviction, there is no conviction unless the court adjudicates guilt. *Raulerson v. State*, 699 So.2d 339 (Fla 5th Dist. C. App. 1997). It is well settled that under Florida law, "a defendant who has adjudication of guilt withheld and successfully completes the term of probation imposed 'is not a convicted person.'" *State v. Gloster*, 703 So.2d 1174 (Fl. Dist. Ct. App. 1. Dist. 1997). The petitioner's term of probation was completed in July 1999.

Therefore, he cannot be considered a convicted person.

As discussed *supra*, a service member may not be separated for conduct that has been the subject of judicial proceedings resulting in the acquittal or action having the effect thereof. ¶ 3a of part 2 of enclosure 2 page 2-3 of SECNAVINST 1910.4B. Here the effect of the action was the same as an acquittal. No conviction was ever entered.

Additionally, the Secretary failed to consider Strickland's potential for rehabilitation as required by 32 C.F.R. Pt. 41 App. A. Consideration of the potential for rehabilitation is an absolute requirement, when, as here, separation is not mandatory.[3] Thus the Secretary was required to consider the potential for rehabilitation.

The separation authority also acted arbitrarily and capriciously in failing to consider the six retention factors

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[3] Although administrative processing is arguably required in this case, separation is not required but is to be determined based on the findings of the administrative board.

delineated in 32 C.F.R. Pt. 41 App. A, part 2(A)(2).[4] The Secretary of Defense stated that the separation authority "should" consider the six factors. Absent some sort of reasoned analysis, a failure to consider them is an arbitrary and capricious action since an agency's decision must not fail to consider an important aspect of the problem. *Motor Vehicles Mfrs. Ass'n* supra., 463 U.S. at 43. Here, the question of whether Strickland should have been retained was the central issue. In failing to consider the retention factors, the Assistant Secretary ignored the core issue.

The Fifth Circuit is in conflict with a number of other Circuits including the Fourth, Ninth, Tenth and District of Columbia Circuits. Accordingly a review under Rule 10(a) is appropriate. Additionally, the Fifth Circuit has conflicted with this Court's rulings to the extent that review is proper under Rule 10(c).

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[4] The factors were repeated in the Military Personnel Manual (MILPERSMAN).

V. The Secretary of the Navy Cannot Discharge Petitioner from the Navy When the Decision Is Unsupported by Substantial Evidence

The jurisprudence has consistently held that an agency's decision must be supported by substantial evidence. *Caiola v. Carroll*, 851 F.2d 395 (D.C. Cir. 1988); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2nd Cir. 1999); *Jones v. Priebe*, 489 F.2d 709 (6th Cir. 1973); *Northern Mont. Health Care Ctr. V. NLRB*, 178 F.3d 1089 (9th Cir. 1999). Substantial evidence requires evidence that a reasonable mind might accept as adequate to support a conclusion. *Universal Camera v. NLRB*, 340 U.S. 474 (1951). A court must ask whether a "reasonable mind might accept a particular evidentiary record" to support the decision. *Dickinson v. Zurko*, 527 U.S. 150 (1999).

The very weak evidence against petitioner was counterbalanced by sworn testimony and the totality of the facts and circumstances surrounding the incident. The board properly considered all evidence and determined that the

preponderance of evidence did not support the proposition that the specific circumstances warranted separation.

The memorandum from the Chief of Naval Personnel to the Assistant Secretary of the Navy provided false and misleading information. The memo's implication was that Strickland was convicted - when in fact he was not.

The failure of the Assistant Secretary to provide a brief statement of reasons or to otherwise document her reasoning on the record prevents a quick determination of whether the decision was properly supported by substantial evidence. Absent any evidence to the contrary there is no basis for finding that the decision of the Separation Authority was supported by substantial evidence.

The Fifth Circuit is in conflict with a number of other Circuits including the Second, Sixth, Ninth and District of Columbia Circuits. Accordingly a review under Rule 10(a) is warranted. Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Universal Camera* and *Dickinson v.*

Zurko, supra., to the extent that review is proper under Rule 10(c). If this Court does not grant the petition for a writ of certiorari, there will be confusion on a subject that goes to the heart of APA judicial review

VI. The Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs

Judicial deference to military authorities is required to allow the military to accomplish its mission by fostering instinctive obedience, unity, commitment, and esprit de corps. *Greer v. Spock,* 424 U.S. 828, 843-844 (1976) (POWELL, J., concurring). Additionally it is difficult for courts to determine the impact upon discipline of any particular decision. *Chapel v. Wallace*, 462 U.S. 296, 305 (1983). In the instant case, there is tension between two levels of the chain of command. On one side the operational forces felt that retaining Strickland would best benefit overall unity, commitment, esprit de corps and discipline. This

sentiment was not shared by the Bureau of Personnel several hundred miles away in Millington Tennessee or the Secretariat, a thousand miles away in Washington. The courts below attached the discretion to the headquarters staffs who are far removed from the units. Petitioner argues that the discretion must remain with the operational Commanding Officers. This appears to be a case of first impression and the court must decide at what level the deference properly lies.

Certainly an administrative board as the finder of fact must be allowed to exercise discretion. Otherwise the board would be useless surplusage rather than real due process. In effect the Secretary and the courts below substituted their judgment for that of the administrative discharge board. It is well settled that a presumption of regularity attached to the members of the administrative discharge board. *Brooks v. United States*, 213 Ct.Cl. 115, 121 (1977); *Boyd v. United States*, 207 Ct.Cl. 1, 9 (1975), *cert. denied*, 424 U.S. 911, (1976); *Crispino v. United States*, 3 Cl.Ct. 306, 312 (1983).

Only the administrative board is empowered to make the finding as to whether misconduct occurred. No regulation grants a reviewing or separation authority the right to make a *de novo* review of that finding. Since the record does not reveal any evidence of bad faith on the part of the board members the courts should not disturb their findings.

While there is no documented case law discussing a reversal of an administrative discharge board by the Secretary, there is ample authority concerning reversals of other administrative bodies such as record correction boards. In overturning a correction board, the Secretary must not act in an arbitrary, capricious manner, unsupported by substantial evidence, or in violation of law. The actions of the Secretary are subject to judicial reversal for violation of such standards. *Sanders v. United States* 594 F.2d 804 (Ct. Cl. 1979). The Secretary can only reverse a correction board based on explicitly stated policy reasons, or upon evidence presented in the record made to the Board. *Horn v. Schlesinger*, 514 F.2d

549, 553 (8th Cir. 1975). *See also*, *Nelson* v. Miller, 373 F.2d 474, 478 (3rd Cir. 1967), *cert. denied*, 387 U.S. 924 (1967). Here, the Secretary improperly based his decision on a memo that was not made available to the board or to Strickland.

No one contests the need for judicial deference to military discretion and expertise. It is not the place of the courts to adjudicate an operational Commanding Officer's orders. Congress requires that military orders be obeyed promptly and completely. *See, e.g.* 10 U.S.C. § 890. Otherwise, lives will be lost and tactical opportunities missed while a judicial debate rages.

For judicial deference to be most effective, it must attach to field commanders. They are the people closest to the problem and those charged with solving those problems. The Navy has given their Commanding Officers ultimate responsibility for their commands. 32 C.F.R. 700.802(a). This includes the authority to depart from his or her orders and instructions, upon his own responsibility. 32 C.F.R.

700.802(b). No other officer at any level of the chain of command is tasked with the ultimate responsibility for his command. Consequently, the deference must be at its apogee when reviewing the decisions of a Commanding Officer and at its perigee when reviewing those overruling his decisions.

With due respect to the Secretary and to the Bureau of Personnel, they were not the finders of fact and did not see the evidence or testimony in this case. The administrative board and the Commanding Officers saw that evidence. More importantly, they had a greater opportunity to review the circumstances of this case and to observe and evaluate Strickland. Consequently, when as, here, the findings of the Commanding Officers and the administrative boards conflict with the opinions of the headquarters staffs, great deference to the operational Commanding Officers and require those who would reverse them to demonstrate a significant policy reason for doing so. To rule otherwise would be to undermine the authority of operational Commanding

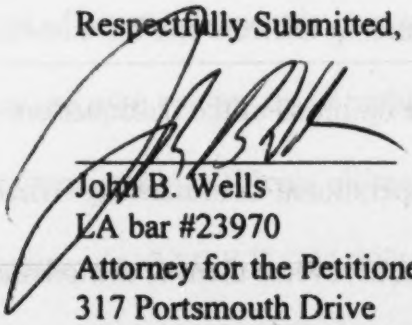
Officers. This could result in those in command choosing to exercise timidity rather than initiative and leadership in operational situations. The willingness of Commanding Officers to assert initiative, often in opposition to guidance issued by headquarters staffs, has played a significant role in U. S. domination of the battlespace.

Since this important area of the law is unsettled, granting certiorari is appropriate pursuant to Rule 10(c).

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,



John B. Wells
LA bar #23970
Attorney for the Petitioner
317 Portsmouth Drive
Slidell, LA 70460-8469
504-641-1855
504-649-1536 (fax)

Supreme Court, U.S.
FILED

No. 001103 JAN - 4 2001

OFFICE OF THE CLERK

In the Supreme Court of the United States

MICHAEL D. STRICKLAND
Petitioner

v.

RICHARD DANZIG, Secretary of the Navy, VICE ADMIRAL DANIEL T. OLIVER, Chief of Naval Personnel, COMMANDER RICHARD LOTH, Commanding Officer, Special Boat Unit Twenty-Two, LCDR R. E. MILLER, Officer in Charge, Personnel Support Detachment
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Appendix

John B. Wells
LA bar #23970
Attorney for the Petitioner
317 Portsmouth Drive
Slidell, LA 70460-8429
504-641-1855
504-649-1536

10 pp

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TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60117
Summary Calendar

MICHAEL D. STRICKLAND

Plaintiff-Appellant,
versus

RICHARD DANZIG, Secretary of the Navy; DANIEL T. OLIVER, Vice Admiral, Chief of Naval Personnel; RICHARD LOTH, Commander, Commanding Officer, Special Boat Unit Twenty-Two, LCDR; R.E. MILLER, Officer in Charge, Personnel Support Detachment Gulfport,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi
USDC No. 1:99-CV-242-GR

Before JOLLY, WIENER, and PARKER, Circuit Judges.

PER CURIAM:*

Richard D. Strickland appeals the district court's summary Judgement dismissal of a complaint challenging his administrative discharge from the Navy. Strickland was administratively processed and discharged as the result of a plea of nolo contendere in civilian court to indecent exposure. On appeal, he argues that the Navy failed to follow its own regulations and it violated his constitutional right to due process during the discharge proceedings. He also argues that the district court erred when it denied his request for a permanent injunction.

Strickland has failed to exhaust his administrative remedy before the Board for Correction of Naval Records. See 10 U.S.C. § 1552; Woodard v. Marsh, 658 F.2d 989, 992

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

(5thCir. 1981); Von Hoffburg v. Alexander, 615 F.2d 633, 637-38 (5th Cir. 1980); Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971). Accordingly, his appeal and complaint are dismissed for lack of jurisdiction. See Hodges v. Callaway, 499 F.2d 417, 421 (5th Cir. 1974). Strickland's appeal of the district Court's denial of his request for a permanent injunction is moot. He complained that if he were discharged it would cause irreparable damage to his career in the Navy. Strickland already has been discharged from the service. Thus, the harm he sought to prevent already has occurred, and the injunctive remedy is moot. See McClelland v. Gronwaldt, 155 F.3d 507, 514 (5th Cir. 1998).

APPEAL DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

MICHAEL D. STRICKLAND

VERSUS CIVIL ACTION NO. 1:99CV242GR

RICHARD DANZIG, Secretary of the Navy; VICE ADMIRAL DANIEL T. OLIVER, Chief of Naval Personnel; COMMANDER RICHARD LOTH, Commanding Officer, Special Boat Unit TWENTY-TWO; LCDR R.E. MILLER, Officer in Charge, Personnel Support Detachment, Gulfport
DEFENDANTS

MEMORANDUM OPINION

This cause is before the Court on motion of the plaintiff, Michael D. Strickland, for entry of a preliminary injunction [PI] {2-1] pursuant to Rule 65 of the Federal Rules of Civil Procedure. Also pending before the Court is the defendants' motions to stay discover [6-1] pending resolution of plaintiff's motion for preliminary injunction, and to dismiss[10-1], or in the alternative, for summary judgment [11-1]. After due consideration of the pleadings, evidence of

record, applicable law, and being otherwise duly advised in the premises, the Court finds as follows.

Statement of Facts

The plaintiff brought this action seeking injunctive relief from this Court so that he would not be separated and discharged from the Navy. (Ct. R., Doc. 1, Compl.) According to Strickland, he was wrongfully discharged because the Navy did not follow regulations issued by the Secretary of Defense and Secretary of the Navy. (PL.'s Mot., p.4.) He contends that Daniel T. Oliver, Chief of Naval Personnel, did not file a statement of reasons for denying a written petition.

This lawsuit stems from Strickland's impending discharge from the Navy after 17 years of service. (P1.'s Mot., p. 1; Defs.' Opp'n to P1.'s Mot. forTemporary Restraining Order [TRO], Exh. A, p. 6.) The discharge resulted after Strickland was arrested by the Jacksonville, Florida sheriff's office on March 30, 1998, on charges of

lewd and lascivious acts, a second degree felony. (Gov't Resp., Exh. A, Administrative Record, pp. 22, 24.) Strickland was stationed aboard the *USS Spruance* and was arrested while ashore for lewd, lascivious or indecent assault or act in the presence of a child. (*Id.*) A woman complained that as she and her children sat in her car in a parking lot at the Jacksonville Beach, Strickland walked up to them with his penis exposed and masturbating. (*Id.*, p. 69.) Strickland contends that he had been shaking sand out of his shorts in a private area of the beach, and not engaged in the alleged conduct. (P1.'s Mot., p. 1.)

On July 10, 1998, Strickland pleaded *nolo contendere* to a charge of indecent exposure, a misdemeanor. (*Id.*, pp. 22, 24.) The court withheld adjudication of guilt, and Strickland was placed on 12 months probation; fined $1,000; given 50 hours of community service, and ordered to have no unsupervised conduct with children. (*Id.*) He also agreed to undergo a psychological evaluation which was completed on

August 10, 1998. (*Id.*, pp. 24, 68-74.) Strickland asserts that his plea was influenced, in part, by assurances from certain naval officials that the Navy would take no adverse action against him as a result of the incident. (Pl.'s Mot., p. 1.)

A report of the incident was received by the Family Advocacy Program at Naval Station Mayport, Florida, which presented Strickland's case to a multidisciplinary case review committee [CRC] under Family Advocacy regulations. (*Id.*, p. 64) In a summary given pursuant to a psychological evaluation, Strickland stated that he pleaded "no contest" to misdemeanor charges of indecent exposure of his genitals "as a plea of convenience to avoid possible incarceration but he denied committing any purposeful act of exposing his penis to the alleged victims." (*Id.*, p. 69.) The CRC determined that the case was substantiated for child sexual abuse and forwarded its determination to the Bureau of Naval Personnel. (*Id.*)

After the Bureau's review, Strickland received word

on October 30, 1998, that he was being considered for an administrative separation from the naval service by reason of "misconduct due to a civilian conviction" and "misconduct due to commission of a serious offense." (*Id.*, p. 20.) Strickland was informed that he had a right to consult with qualified counsel, submit statements to the administrative board or the separation authority in lieu of a hearing, obtain copies of documents that would be forwarded to the separation authority, request an administrative board hearing, and be represented by counsel before the administrative board. (*Id.*, p. 11.) Strickland requested an administrative board, and the members of the board, a recorder, and military counsel for Strickland were appointed on December 9, 1998. (*Id.*, pp. 19-21.)

An administrative board was appointed by the Commanding Officer of the *USS Spruance*, Charles E. Wilson, Jr., on December 9, 1998, to consider whether Strickland committed misconduct and whether he should be

retained in the service. (Govt's Resp., Exh. A, p. 19; DD 963.) The board hearing was held December 10, 1998, pursuant to the Military Personnel Manual** [MILPERSMAN] to consider his case. (*Id.*, pp. 8-21) Strickland waived a complete reading of his rights under the MILPERSMAN. (*Id.*)

The recorder presented the government's exhibits, which included the appointing order and plaintiff's rights notification, a copy of the report of the civilian court action and relevant portions of the MILPERSMAN. (*Id.*, pp. 11-13, 19-22.) Strickland's military counsel presented excerpts from the MILPERSMAN; a letter from the civilian attorney who represented Strickland before the Florida civilian court; Strickland's letter to the Family Advocacy Case Review Board; a letter from Strickland's executive officer on his

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**The administrative separation of enlisted personnel in the Navy is governed by Chapter 36 of the MILPERSMAN, which implements Secretary of the Navy Instruction [SECNAVINST] 1910.4B.

behalf; and excerpts from Strickland's service record. (*Id.*, pp. 13, 24-62.) He presented witnesses from his command regarding his work performance and potential for further service. (*Id.*, pp. 14-15.)

The Board entered a finding of "no misconduct" concerning the first basis for separation, commission of a serious offense. (*Id.*, p. 16) The government argues that under the regulations, the Board was bound to enter a finding of misconduct under the second basis for separation, misconduct due to civil conviction. (*Id.*) The Board recommended that Petty Officer Strickland be retained in the Naval service. (*Id.*)

On April 5, 1999, Strickland's former commanding officer reported the finding and recommendations of the Administrative Board to the Chief of Naval Personnel. (*Id.*, pp. 6-7.) He concurred with the Board's finding and recommendations, and attached a separate endorsement to the report, strongly recommending Strickland's retention. (*Id.*,

pp. 6, 8.) After reviewing the separation package, the Chief of Naval Personnel disagreed with the recommendations, and forwarded the package to the Assistant Secretary of the Navy (Manpower and Reserve) for a determination. (*Id.*, p. 3) The Assistant Secretary agreed with the Chief of Naval Personnel's recommendation, and decided that Strickland should be separated with a General Discharge (Under Honorable Conditions.) (*Id.*)

On January 25, 1999, Strickland was transferred to the Special Boat Unit Twenty-Two at Stennis Space Center [Stennis] in Hancock County, Mississippi. The Chief of Naval Personnel disagreed with the administrative board and the commanding officer's recommendations and forwarded the discharge package to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) for a determination. (*Id.*, p. 3.) The Assistant Secretary agreed with the Chief of Naval Personnel's recommendation and decided that Strickland should be separated with a General Discharge. The Bureau of

Naval Personnel issued a message to Strickland's current unit to discharge him within 10 days of May 27, 1999. That date has since been changed to June 28, 1999.

On July 1, 1999, after a hearing held June 24, 1999, the Court entered an order granting the plaintiff's motion for TRO, with a hearing on a preliminary injunction set for July 6, 1999. (Ct. R., Doc. 5.) The defendants were prohibited from separating Strickland from active duty in the United States Navy. (*Id.*) On July 6, 1999, the TRO was extended until August 9, 1999, due to witness unavailability. (Ct. R., Doc. 8.)

Strickland asserts that irreparable harm would occur if he is subject to discharge at this time. (Pl.'s Supp. Br., p. 4.) He would lose his current promotion opportunity to Chief Petty Officer, to be assigned to a special warfare command referred to in testimony as a Spec 4 billet, and certain training opportunities. (*Id.*) He would also lose critical time in his service record which might influence future selection boards

if he is later restored to duty. (*Id.*)

Strickland has presented testimony from Master Chief Kelly Webb and Senior Chief Daniel Brickson of Strickland's current command, who testified that the command would benefit from his retention. (Hearing Test.) Master Chief Webb stated that a replacement for an unplanned loss would take six to nine months to secure and the command was short of personnel at the time of the hearing in July. (*Id.*) Master Chief Webb stated he would retain Strickland in his position. (*Id.*)

Senior Chief Brickson stated that Strickland reports to him in his current duty assignment. (Hearing Test.) Senior Chief Brickson stated that Strickland would not be eligible for a Spec 4 billet again if here discharged at this time. (*Id.*) He also testified that assignments are placed on the needs of the Navy and that an individual does not have the right to a particular assignment. (*Id.*)

Strickland argues that his due process rights were

disregarded by the Navy, and that regulations were not followed in proceedings against him. (Pl.'s Supp. Br., p. 1.) He asserts that he was misled into believing that if he plead *nolo contendere* to the civilian charge, there would be no repercussions on his career with the Navy. (*Id.*, pp. 1-2; Hearing Test; Ct. R., Doc. 1, Strickland Aff., p. 2; Pl.'s Supp. Br., p. 13.)

Lieutenant (Junior Grade) Robert M. Swahn, was the Ordinance Office of the USS Spruance from January 1997 until December 1998. (Swahn Declaration, p. 1.) One of his duties in this capacity was to serve as ship's Legal Officer. (*Id.*) He attended Strickland's bail hearing at the Jacksonville jail after Strickland's arrest. (*Id.*, p. 2.) Strickland told Lieutenant Swahn that he "did not do what he was charged with." (*Id.*) Lieutenant Swahn spoke to Commander Wilson about the charges leveled against Strickland. (*Id.*) According to Lieutenant Swahn, Commander Wilson's position on the situation was that if Strickland were found guilty of a felony,

he would be processed for separation from the Navy. (*Id.*) If Strickland pleaded guilty to a misdemeanor, Lieutenant Swahn understood that Commander Wilson would not seek Strickland's separation. (*Id.*, pp. 2-3.) Lieutenant Swahn relayed the following summary of his discussions with Strickland:

> I am not sure who came up with the idea, Commander Wilson, Petty Officer Strickland, or myself, but I visited the local Trial Service Office to find out what Navy Legal's reaction would be. Lieutenant Mark Benfield was who I talked to. After discussing the facts of the case, Lieutenant Benfield said that he did not see Navy Legal taking Petty Officer Strickland to a court-martial or administratively separating him over a misdemeanor. I returned and told this to Commander Wilson. I was then told to talk to Petty Officer Strickland.
>
> I relayed the following information to Petty Officer Strickland: Commander Wilson and Navy Legal would not seek separation or court-martial for a no contest plea to misdemeanor. Petty Officer Strickland then entered the no contest plea.
>
> About one month later, the local Family Advocacy Program office (FAP) sent *USS*

> *SPRUANCE* a letter. FAP said, Petty Officer Strickland had to go to an administrative board. We did not understand how this could be. I visited FAP to find out their position. After my visit, two FAP representatives came to *USS SPRUANCE* and talked to the ship's Commanding Officer, Commander Wilson. I was not present for that meeting. I informed Petty Officer Strickland of Family Advocacy's position and that he would be going to an administrative board.

(*Id.*, p. 3.)

According to Commander Wilson, Lieutenant Swahn talked with him about Strickland's case. (Def's Resp., Wilson Aff., p. 1.) Commander Wilson told Lieutenant Swahn that if the allegations about exposing his penis in front of a woman and her children were true, that Strickland would be processed for discharge from the Navy for commission of a serious offense. (*Id.*, p. 2.) Commander Wilson spoke with Lieutenant Swahn again, when he received the report that Strickland was intending to enter a "no contest" plea to the indecent exposure charge. (*Id.*) Lieutenant Swahn told Commander

Wilson that the charge was a misdemeanor, and asked what the repercussions to Strickland would be as a result of the plea. (*Id.*) Commander Wilson told him that he would not take any action against Strickland, if that was all Strickland was guilty of, but did not intend for Lieutenant Swahn to repeat the discussions to Strickland. (*Id.*) He never spoke directly to Strickland and stated that he did not intend for his comments to induce Strickland to enter the plea. (*Id.*) Commander Wilson also stated "at the time I discussed Petty Officer Strickland's case with Lieutenant Swahn, I did not realize that Navy regulations required me to process Petty Officer Strickland for separation. I thought that the decision to take action against him was at my own discretion." (*Id.*)

Commander Wilson also conveyed the following information regarding Strickland's situation:

> Sometime later I received a letter from the local Navy Family Advocacy Program office recommending I take administrative action against Petty Officer Strickland. I then sought an opinion through Lieutenant Swahn or

> Lieutenant Commander Nygaard from a Command Services attorney at the local Trial Service Office, who informed me that administrative processing was mandatory in cases of deviant sexual behavior, to include "indecent exposure," such as that to which Petty Officer Strickland pled no contest. Therefore, I sent Petty Officer Strickland to an administrative board.
>
> The administrative board considered two grounds for separation: Misconduct due to Commission of a Serious Offense and Misconduct due to Civilian Conviction. The administrative board found no misconduct as to Commission of a Serious Offense, but did find misconduct as to the Civilian Conviction. However, the board recommended retention.
>
> I agreed with the administrative board's recommendations, and forwarded the report to the Bureau of Naval Personnel with a favorable endorsement. Shortly thereafter, Lieutenant Commander Nygaard notified the Bureau of Naval Personnel of the administrative board results and they authorized me to transfer Petty Officer Strickland to his new duty station. I lost track of Petty Officer Strickland, and what was happening in respect to his discharge, after he left my command.

(*Id.*, pp 2-3.)

Strickland argues that he was not "convicted" as the term is defined under Florida law. (Pl.'s Opp'n Br., p. 8.)

He contends that the Secretary's decision was made in reliance on "a one page memo prepared by the Chief of Naval Personnel . . . containing erroneous information." (*Id.*, p. 9.) He asserts that materials were submitted to the Separation Authority "in violation of law and their own regulations." (*Id.*, p. 10.) Because the Assistant Secretary did not provide a brief statement of reasons for the separation, or document her reasoning on the record, Strickland argues that there is no basis to find that the decision of the Separation Authority is supported by substantial evidence. (*Id.*, p. 13.)

Strickland contends that under the provisions of SECNAVINST 1910.4B, if the board found no misconduct then the separation authority "cannot separate the service member for that alleged reason." (Pl.'s Reply to Defs.' Opp'n to Mot. for Injunctive Relief, p. 5; Administrative Rec., p. 45.) The relevant portion of the manual provides as Strickland asserts, however, the manual goes on to state:

> Regardless of any Board finding in an

> individual case, the separation authority always retains the option of requesting separation of the service member by the Secretary under the Secretary's plenary authority. Prior to sending the discharge package to the Secretary, the separation authority should follow the notification procedure appropriate to this reason for separation.

(*Id.*)

Strickland asserts that the military crime of indecent exposure and the Florida statute are different, so his conviction did not meet the requirements of the MILPERSMAN. (*Id.*, p. 6.) Strickland argues that the portion of the MILPERSMAN which states that conduct "tantamount to a finding of guilty" is binding on the administrative board is vague and facially invalid. (*Id.*)

Strickland contends that the separation authority must consider his potential for rehabilitation. (*Id.*, p. 7.) He maintains that he has a right to all documents forwarded to the separation authority, which he did not receive. (*Id.*, p. 8.) He was not notified that the case was forwarded to the

Secretary without an opportunity for him to comment on a letter from the Commanding Officer of Naval Station Mayport and a psychological evaluation. (*Id.*) He maintains that the Secretary of Defense codified his right to receive the documents sent to the separation authority, and Fifth Amendment property interests in retaining his position in the military are implicated. (Pl.'s Opp'n to Defs.'s Supp. Resp., p. 9.)

Strickland asserts that the Assistant Secretary may have been presented "false and misleading information" because the administrative board did not consider a conviction on his part. Under the relevant section of the MILPERSMAN governing separation by reason of misconduct and civilian conviction, a *nolo contendere* plea constitutes an action tantamount to a finding of guilt. (Pl.'s Reply to Defs.' Opp'n to Mot. for Injunctive Relief; Administrative Rec., p. 27.) A member may be separated under three circumstances if a *nolo contendere* plea is

entered: (1) when the offense would warrant a punitive discharge per MCM, Appendix 12 for the same or closely related offense; (2) the specific circumstances of the offense warrant separation; or (3) civil sentence includes confinement for six or more months without regard to suspension, probation, or early release. (*Id.*) Processing is mandatory for deviant sexual behavior which includes indecent acts and/or exposure. (*Id.*, p. 28.)

Strickland contends that the decision of the Separation Authority is not supported by substantial evidence. (*Id.*, p. 10.) Strickland contends that10 U.S.C. § 1169 delegates to the Secretaries of Defense and Transportation the power to regulate administrative discharges for regular enlisted personnel. (*Id.*, p. 5.)

The defendants filed a motion to dismiss, or in the alternative, for summary judgment, contending that Strickland has not met his burden for injunctive relief and that his complaint should be dismissed. (Defs. Resp. to Pl.'s

Supp. Br., p. 1.) The government contends that a sailor does not have a vested right to a particular assignment, because assignments are subject to change at any time contingent on the needs of the Navy. (*Id.*, p. 5.)

Discussion

To obtain a preliminary injunction, Strickland has the burden of demonstrating each of the following elements: (1) a substantial likelihood that he will prevail on the merits; (2) a substantial threat that he will suffer irreparable injury if an injunction is not entered; (3) that the threatened injury to him outweighs the threatened harm the injunction may do to the nonmoving party; and (4) that granting the injunction will not disserve the public interest. *Sunbeam Prods., Inc. v. West Bend Co.*, 123 F.3d 246, 250 (5th Cir. 1997), *cert. denied* ____U.S. _____, 118 S. Ct. 1795 (1998). Furthermore, an injunction is granted only if the movant clearly carries the burden of persuasion on all factors. *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999).

A preliminary injunction is granted in exceptional circumstances. *Cherokee Pump & Equip., Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994). If the movant fails to meet the burden on any of the four elements, or fails to prove that irreparable injury will occur if the injunction does not issue, the preliminary injunction will be denied. *Sierra Club v. FDIC*, 992 F.2d 545, 574 (5th Cir. 1993). An injury is only irreparable if it cannot be undone through a remedy at law. See *Lockheed Martin Corp v. Raytheon Co.*, 42 F3.d 632, 636 (5th Cir. 1999).

The United States Supreme Court has recognized a district court's authority to grant interim relief to a federal employee in matters of government service, but has provided that the court is "bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded . . . was likely to have on the administrative process," and that the "Government has traditionally been granted the widest latitude in the dispatch of its own internal

affairs." *Sampson v. Murray*, 415 U.S. 61, 84 (1974). A showing of irreparable injury in these cases must be "sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases." *Sampson*, 415 U.S. at 84. This standard is utilized in challenges involving the military. *Hartikka v. U.S.*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29,33 (1st Cir. 1984).

The defendants have moved to dismiss, or in the alternative, for summary judgment, asserting that Strickland was properly separated from the service. (Defs.' Mot. for Summ. J.) Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, along with affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). The moving party bears the initial burden of establishing the absence of evidence to support the nonmovant's cause of

action . *Celotex*, 477 U.S. at 325; *Hirras v. National R.R. Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996). Should this burden be met by the moving party, the nonmoving party must then establish sufficient facts beyond the pleadings to show that summary judgment is inappropriate. *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1297 (5th Cir. 1993). The Court examines applicable substantive law to determine which facts and issues are material. *King v. Chide*, 974 F.2d 653, 655-56 (5th Cir. 1992). The nonmoving party must oppose the summary judgment motion either by referring to evidentiary material already in the record or by submitting additional evidentiary documents which set out specific facts indicating the existence of a genuine issue for trial. FED.R.CIV.P. 56(e). If the opponent fails in his duty, after the Court has viewed the evidence in the light most favorable to the nonmovant, summary judgment is implicated. *Id.*; *Exxon*, 4 F.3d at 1297.

In addition, the complaint makes clear that

jurisdiction in this matter is based on the Administrative Procedure Act [APA], which waives sovereign immunity for an action "seeking relief other than money damages," and provides for judicial review of any "final agency action for which there is no other adequate remedy in a court". 5 U.S.C.§§ 702,704. In a suit involving the APA, an appeal to a superior agency authority is a prerequisite to judicial review only when "expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993).

Under the APA, review of the administrative record mandates upholding the decision unless shown to be arbitrary, capricious, an abuse of discretion, contrary to law or regulation, or lacking the support of substantial evidence. *Chappell v. Wallace*, 462 U.S. 296, 303 (1983). The court will "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *Bowman*

Trans., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974). Courts are particularly reluctant to interfere "upon the authority of the Executive in military and national security affairs." *Dept. of Navy v. Egan*, 484 U.S. 518, 529 (1988). The Fifth Circuit Court of Appeals in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) employed a multi-factor test to determine whether a particular constitutional claim asserted by members of the armed forces against their superiors is barred from suit.

To obtain review of an internal military decision, a plaintiff must allege that the military has violated a statutory, regulatory or constitutional provision and demonstrate that he has exhausted his available intra service remedies. *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980); *Stinson v. Hornsby*, 821 F.2d 1537, 1540 (11th Cir. 1987). After the plaintiff meets this threshold, the Court must balance the affected interests to determine the propriety of review of the military's decision. The factors to be examined

are: (1) the nature and strength of the plaintiff's challenge to the military determination . . . ; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of the anticipated interference with military function . . . ; and (4) the extent to which the exercise of military expertise or discretion is involved. *NeSmith*, 615 F.2d at 196; *Stinson*, 821 F.2d at 1540.

Although the defendants assert that Strickland has not satisfied the threshold *Mindes* requirements because he has not filed an application for relief with the Board for Correction of Naval Records [BCNR], Strickland contends that an appeal to the BCNR in this case would be futile. (Defs.' Opp'n to Inj., p. 9; Pl.'s Mot. for Inj., p. 5.) He maintains that under section 6(e) of the APA military authorities must provide a brief statement of reasons for denying a written petition, which he was not provided. (*Id.*, p. 6.) He also asserts that the BCNR lacks the authority to declare a regulation or conduct unconstitutional. (*Id.*) He

contends that his Fifth Amendment rights were violated along with the regulations including 32 C.F.R. Part 31, App. A, SECNAVINST 1910.4B, and the MILPERSMAN. (*Id.*, p. 8.) He asserts that the Secretary of Defense requires that a separation authority consider a member's potential for rehabilitation before discharge, and that specific retention criteria should be considered. (*Id.*) He maintains that because the record does not reflect such consideration of these factors, defendant Oliver and Danzig violated the Secretary of Defense's directives.

In addition, Strickland asserts that the discharge message [AR 1] ordered that the grounds for discharge be "Misconduct" and block 28 of the DD-214 be annotated to reflect misconduct. This action goes against SECNAVINST 1910.4B, which notes that "if the Board finds a preponderance of evidence does not support one or more reasons for separation alleged and recommends retention the separation authority cannot separate the service member for

that alleged reason." [AR 45].

Strickland argues that if the separation authority request separation, it must be done under the Secretary's plenary authority after using the notification procedure. (Pl.'s Mot. for Inj., p. 9.) He contends that the notification procedure must be used prior to any action taken by the Secretary of the Navy. (*Id.*) The notification procedure allows the respondent (Strickland) to obtain copies of all documents forwarded to the Secretary of the Navy and to submit a written statement to be considered by the separation authority, which Strickland asserts he was denied. (*Id.*) Strickland contends that Danzig and Oliver's decisions were not supported by substantial evidence. (*Id.*, p. 11.) He asserts that the only evidence against him was the case report, and that no civilian conviction was presented to the board, because there was not a conviction entered. (*Id.*)

Strickland argues that although the MILPERSMAN authorizes separation on the basis of misconduct for a civilian

conviction, certain circumstances must be present to warrant separation. (*Id.*, p. 13.) He contends that he must be sentenced in the civilian conviction to confinement for six months or more, or the Manual for Courts-Martial must authorize a punitive discharge for the same or closely related offense. (*Id.*, citing MILPERSMAN 1910-44.) Strickland asserts that he was not sentenced to confinement for six months or more, and that there is no related offense in the Manual for Courts-Martial. (*Id.*, pp. 13-14.)

The defendants contend Strickland's separation proceeded in accordance with agency regulations. (Defs.' Opp'n to Inj., pp. 10, 12.) The Navy has its own regulations which include the SECNAVINST and MILPERSMAN. The defendants assert that an injunction in this case would interfere with the defendants' ability to "efficiently manage Naval personnel" and would interfere in matters of military personnel morale and discipline. (*Id.*) According to the defendants, the regulations provide that an individual may be

processed for separation when he is convicted by a civilian court, "either actual or through acceptance of conditions imposed by the court for entry into a program of deferred prosecution or other such diversionary programs." (*Id.*, p. 13, quoting MILPERSMAN 1910-144.) In addition, such processing is mandatory when the conviction involves sexual misconduct, such as indecent exposure. (*Id.*)

If a court accepts a plea of *nolo contendre* and withholds adjudication, having the effect of an acquittal, the member must still be processed. (*Id.*, citing MILPERSMAN 1910-220.) The civilian conviction, or finding "tantamount to a finding of guilty," is binding on the administrative board regarding a finding of misconduct. (*Id.*, citing MILPERSMAN 1910-144; 1910-514.)

The Chief of Naval Personnel provided the following regarding Strickland's separation:

> An administrative board found GM1 Strickland committed misconduct due to civilian conviction and recommended retention. His Commanding officer concurs. CHNAPERS does not concur. This case is forwarded per reference (a) recommending separation.

> The administrative had evidence (enclosure (1)) which demonstrates an incompatibility with further military service. Specifically.
>
> GM1 Strickland was arrested for exposing himself and masturbating in the presence of two minor children. He was charge [sic] with lewd and lascivious acts in the presence of a minor. He pled no contest to the lesser charge of indecent exposure in public. He as sentenced to 12 months probation, $1,000 fine, 50 hours of community service, and directed to have no unsupervised contact with children.
>
> Recommend you approve the administrative separation of GM1 Strickland for misconduct due to civilian conviction with characterization of service as General (Under Honorable Conditions).

(Defs.' Resp., Exh. A., p. 3.)

Under SECNAVINST 1910.4B, if the administrative board recommends retention in a case, the separation authority may submit the case to the Secretary of Navy recommending separation. (Pl.'s Designation of Administrative Rec., p. 45.) A mandatory portion of the provision states: "The separation authority must specify

evidence of record relied upon in reaching its conclusion." Strickland contends this was not done in this case. (P1's Mot. for Inj., p. 11.) The Court, however finds that the specific reference to Strickland's state court record satisfies this mandate.

Strickland argues that fundamental fairness dictates that he should not be discharged (P1.'s Opp'n to Supp., p. 13.) He contends that he acted in reliance on Lieutenant Swahn's information that he would not be discharged if he pled *nolo contendere* to the indecent exposure charges. (*Id.*, p. 14.) He claims that the regulations conflict with each other, and there was no way he could have known the risk he faced by entering such a plea. (*Id.*) He contends that his superiors "also interpreted the regulations in a manner favorable to [him]." (*Id.*)

Strickland asserts that he was not trained in interpreting the MILPERSMAN, and his commanding officers were trained, in such matters. (*Id.*) He contends that

it is fundamentally unfair that he was induced to enter the *nolo contendere* plea, with assurances that he would not be separated, and then was separated as a result of the plea. (*Id.*, p.15.) Strickland argues that the case should be resolved by using general equity powers, and seeks that "the court not hold him responsible for an understandable mistake of judgment based upon his reasonable reliance on the assurances of his superior." (*Id.*)

The defendants argue that even if Strickland entered his plea in reliance on Commander Wilson's statement to Lieutenant Swahn, such an assurance would be an *ultra vires* act which would not bind the Navy. (*Id.*, pp. 14-15.) Because the defendants argue that Strickland's processing for sexual misconduct is mandatory, not discretionary, the defendants maintain that Commander Wilson had no authority to make a different determination for the outcome of Strickland's case. (*Id.*, p. 15.)

"Equitable estoppel does not rest on the grounds that

the claimant is in reality entitled to the benefit or status in question. Rather, equitable estoppel responds to the unfairness inherent in denying the claimant some benefit after it has reasonably relied on the misrepresentations of the adverse party." *U.S. v. Marine Shale Processors*, 81 F.3d 1329, 1348 (5th Cir. 1996). "[W]hile Congress may create a remedy for federal employees' issuance or erroneous legal advice, 'judicial adoption of estoppel based on agency misinformation would, on the other hand, vest authority in these agents that Congress would be powerless to constrain." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 429 (1990). Application of the principles of estoppel against the government is available only in the narrowest of circumstances. *Heckler v. Community Health Servs.*, 467 U.S. 51, 2228 (1984). Utilization of estoppel may be appropriate in circumstances when "public interest in ensuring that the government can enforce the law free from estoppel [is] outweighed by the countervailing interest of

citizens in some minimum standard of decency, honor, and reliability in their dealings with the Government." *Heckler*, 467 U.S. at 59. Accordingly, although Strickland asserts that he is not seeking relief under estoppel when he contends that his reliance on his commander's word that he would not be processed for separation if he entered a *nolo contendere* plea in the state court proceedings against him, equitable estoppel "responds to the unfairness inherent in denying the claimant some benefit after [he] has reasonably relied on the misrepresentations of the adverse party." *U.S. v. Marine Shale Processors*, 81 F.3d 1329, 1248 (5th Cir. 1996).

"[T]o state a cause of action for estoppel against the government, a private party must allege more than mere negligence, delay, inaction, or failure to follow an internal agency guideline." *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987). In addition, when an official misstates that a particular regulation or statute does not apply to a claimant, the Court must consider that "citizens dealing with the

government, are presumed to know the law." *See USF&G v. Bass*, 619 F.2d 1057, 1077 (5th Cir. 1980). When a regulation clearly provides to the contrary of an officer's misstatement, a claimant cannot have reasonably relied on the officer's representation. *Marine Shale*, 81 F.3d at 1349-50. Such is the case here - - the MILPERSMAN clearly indicates that Strickland would be processed for separation for a civilian conviction.

Furthermore, even if Strickland reasonably relied on Commander Wilson's statement that he would not face separation from the service in entering a plea in this case, there is no evidence

that Commander Wilson deliberately misled Strickland. Commander Wilson also stated that he thought he was correct when he provided the information to Strickland. (Def.'s Resp., Wilson Aff., p. 2.) This is not the type of situation which warrants the application of estoppel against the government. *See Ingalls Shipbuilding, Inc. v. Director*, 976

F.2d 934, 938 (5th Cir. 1992); *REW Enter. v. Primer Bank, N.A.*, 49 F.3d 163, 170 (5th Cir. 1995); *FDIC v. Hulsey*, 22 F.3d 1472, 1490 (10th Cir. 1994). The Court concludes that Strickland is not entitled to relief based on his argument regarding fairness and the use of the Court's general equity powers.

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Under SECNAVINST 1910.4b K (4), a servicemember can be separated for misconduct because of a civilian conviction. (Pl.'s Mot. for Inj., Exh. C, pp. 1-25, 1-26.) The following conditions must also be present: (1) a punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial (reference (r)) or; (2) the sentence by civilian authorities includes confinement for six months or more without regard to suspension or probation. (*Id.*, p. 1-26.) Under the MILPERSMAN, a Navy service

member may be processed for separation when he has been convicted by a civilian court, and processing is mandatory for sexual misconduct. MILPERSMAN 1910-144.

Strickland raises a constitutional challenge based on due process because of his separation. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of Due Process Clause of the Fifth . . . Amendment." *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). Strickland must establish that he has a property or liberty interest. There is no property interest created in 10 U.S.C. § 1169, and a property right is not created by a person's subjective expectancy. *Perry v. Sindermann,* 408 U.S. 593, 603 (1972). The armed forces retain the discretion to discharge enlisted personnel, as outlined in 10 U.S.C.§ 1169. *See Rich v. Secretary of Army*, 735 F.2d 1220, 1226 (10th Cir. 1984).

Plaintiff alleges that the potential for rehabilitation

was not considered by the separation authority although under the regulations this is not a requirement. Rehabilitation is recommended for those individuals who show "exceptional potential for further useful service" but the ultimate decision to recommended rehabilitation lies with the commanding officer. Based on the evidence and the testimony presented, there does not appear to be a substantial likelihood that the plaintiff would be successful on his claim that the potential for rehabilitation was not fully considered.

Under the APA, the judiciary may set aside agency actions that are "arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law". 5 U.S.C. § 706(2)(A). The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle MFRS Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Deference to the agency is appropriate even where the petitioner advances more then a plausible reading

of the statute. *General Elec. V. EPS*, 53 F.3d 1324, 1327 (D.C. 1995). Further, in considering military administrative decision, the standard of judicial review is even further narrowed as courts have been "reluctant to intrude upon the authority of the Executive in the military or national security affairs." *Egan*, 484 U.S. at 530.

As presented, the Court does not find at this time that plaintiff's allegations of procedural error suggest a likelihood of success on the merits. The Court finds for the limited purpose of considering the pending preliminary injunction that there is not substantial likelihood that plaintiff will prevail on the merits under *Mindes*. The first *Mindes* factor mitigates against Strickland, because he has not established a due process claim against the Navy. As to the second factor, in *Mindes*, the Court finds that the harm to the plaintiff, although significant, is not irreparable. If an error were found sufficient to warrant correction of the plaintiff's misconduct processing and discharge, he could be made whole by later

rulings of the BCNR or in a court.

The Court further finds that the potential interference with the defendants' ability to efficiently manage Naval personnel is great when a court interferes in a decision to separate enlisted personnel. *Chappell*, 462 U.S. at 300. The third *Mindes* factor weighs against granting Strickland the relief sought. Finally, the fourth *Mindes* factor also balances against Strickland, because this case clearly involves military discretion exercised in matters of military personnel moral and discipline. *Guerra v. Scruggs*, 942 F.2d 270, 280 (4th Cir. 1991).

In granting a preliminary injunction, this Court must find that the plaintiff will suffer irreparable harm by demonstrating that he would suffer harm for which no adequate remedy can be obtained in the normal course of available remedial administrative or legal proceedings. The harm alleged by the plaintiff is: (1) he will lose a career enhancing operation billet; (2) loss of favorable consideration

by the Chief Petty Officer selection board; and (3) he will lose potential separation or retirement benefits.

In light of the special status of the military, however, the courts have required more hardship for the granting of injunctive relief against military discharge. In *Hartikka v. U.S.*, 754 F.2d 1516, 1518 (9th Cir. 1985) the court reversed the district court grant of an injunction against the discharge of an Air Force captain pending the administrative appeal of his discharge under honorable conditions (general). The Court noted that "such a discharge is appropriate when a member's military record is not sufficiently meritorious to warrant honorable characterization." A general discharge under honorable conditions is not sufficient injury to warrant an injunction. *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984).

An injury is irreparable if monetary remedies are inadequate. The Fifth Circuit has found that a salary loss representing 45 percent of a family income and the potential

loss of the plaintiff's home did not constitute irreparable injury. *Mississippi Power & Light Co. v. United Gas Liner Co.*, 760 F.2d 618 (5th Cir. 1985); *White v. Carlucci*, 862 F.2d 1209 (5th Cir. 1989). The Court finds that monetary compensation and reinstatement for plaintiff's injuries, if any, would adequately remedy plaintiff's situation thereby allowing the Court to conclude that plaintiff's motion for preliminary injunction should be denied. *Canal Auth.*, 489 F.2d at 574.

The harm to the plaintiff, while significant, does not outweigh the harm of the injunction to the defendants. The Fourth Circuit Court of Appeals found that:

> The harm to the army is greater than it first appears. If we upheld the injunction granted under the facts before us, injunctions would be routinely sought . . . . The result would be judicial second guessing of the kind courts have been reluctant to engage in . . . . To start second guessing in the military would be a disruptive force as to the affairs peculiarly within the jurisdiction of the military authorities.

Guerre v. Scruggs, 942 F.2d 270, 275 (4th Cir. 1991).

In *Coney v. Dalton*, 877 F. Supp. 508, 514 (D. Haw. 1995), the Court noted that the history and purpose of an involuntary separation from the military has as its primary focus the preservation of the integrity and fighting fitness of the armed forces. Section 3610100 of the MILPERSMAN states that "the policy of the Navy is to promote readiness by maintaining high standards of conduct and performance and that the Navy separation policy strengthens the concept that military service is a calling different from any civilian occupation." MILPERSMAN § 3610100(3). In light of the military's special role and its purpose vis-a-vis the public, courts have required that the circumstances of harm alleged by the movant for injunctive relief must be truly extraordinary and the harm truly drastic in order to justify the intervention of the Court in the affairs of the military and as a result of the trust placed by the public.

The Courts finds the interest of the public lies with the defendant. Plaintiff was found to have committed misconduct and then, in accordance with administrative processing procedure he was separated from the Navy. The public has an interest in maintaining a Navy which is known for its high moral and level of discipline. The public has an interest in allowing the military, in an orderly fashion, to fully adjudicate claims on the part of its own personnel, free of the unnecessary interference by the federal courts. *McBride v. West,* 940 F. Supp. 893, 896 (E.D. N. C. 1996). Moreover, the plaintiff can be returned to his position through the actions of the BCNR or a reviewing court. The Court, therefore, concludes that the public interest in keeping the plaintiff in the military during the pendency of this matter is minimal. Accordingly, the Court finds that Strickland's motion for preliminary injunction should be denied.

Having found no error in the Navy's separation of Strickland from service, the Court concludes that the

defendants' motion for summary judgment should be granted. In addition, the Court finds that the defendants' motion to dismiss should be denied as moot. The Court, therefore, concludes that this case should be dismissed. These findings render the defendants' motion to stay discovery moot, and the Court shall deny the motion accordingly.

Conclusion

The Court finds that, for reasons set forth above, Strickland's motion for permanent [2-1] injunction should be denied. In addition, the Court finds that the defendants' motion to stay [6-2] discovery in this matter should be denied as moot. The Court concludes that the defendant's motion to dismiss [10-1] should be denied as moot, and that the motion for summary judgment [11-1] should be granted. As a result, this lawsuit will be dismissed. A separate Final Judgment in conformity with and incorporating by reference the forgoing Memorandum Opinion shall issue. Each party shall bear their respective costs in connection with this motion.

THIS, the 12th day of January, A.D., 2000.

/S/

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

MICHAEL D. STRICKLAND PLAINTIFF

VERSUS CIVIL ACTION NO. 1:99CV242GR

RICHARD DANZIG, Secretary of the Navy; VICE ADMIRAL DANIEL T. OLIVER, Chief of Naval Personnel; COMMANDER RICHARD LOTH, Commanding Officer, Special Boat Unit TWENTY-TWO; LCDR R.E. MILLER, Officer in Charge, Personnel Support Detachment, Gulfport DEFENDANTS

FINAL JUDGMENT

This cause is before the Court on motion of the plaintiff., Michael D. Strickland, for entry of a permanent injunction [PI] [2-1] pursuant to Rule 65(b) of the Federal Rules of civil procedure. The defendants also seek an order staying [6-1] discovery in this matter. In addition, the defendants filed a motion to dismiss [10-1] the suit for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alterative, for summary judgment [11-1] pursuant to

Federal Rule of Civil procedure 56. Pursuant to the Memorandum Opinion entered in this cause, this date, incorporated herein by reference, it is therefore.

ORDERED AND ADJUDGED that Strickland's motion for PI [2-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendants' motion to stay discovery [6-1] in this case be, and is hereby denied. It is further,

ORDERED AND ADJUDGED that the dependants' motion for summary judgment [11-1] be, and is hereby granted. It is further,

ORDERED AND ADJUDGED that the defendants' motion to dismiss [10-1] be, and is hereby, denied as moot. It is further,

ORDERED AND ADJUDGED that the case be, and is hereby, dismissed with prejudice. It is further,

ORDERED AND ADJUDGED that each party shall bear their respective costs.

SO ORDERED AND ADJUDGED, this the 12th day of January, A.D., 2000.

/s/

UNITED STATES DISTRICT JUDGE

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action

meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

10 U.S.C. § 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer

Any person subject to this chapter who–

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

10 U.S.C. § 1552. Correction of military records: claims incident thereto

(b) (1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment)

or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid--

(1) to the surviving spouse, heir, or beneficiaries,

in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under

subsection (a) may extend only to--

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

10 U.S.C. § 1169. Regular enlisted members: limitations on discharge

No regular enlisted member of an armed force may be discharged before his term of service expires, except--

(1) as prescribed by the Secretary concerned;

(2) by sentence of a general or special court martial; or

(3) as otherwise provided by law.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(b) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Fl Stat. §800.03. Exposure of sexual organs

It is unlawful to expose or exhibit one's sexual organs in public or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or to be naked in public except in any place provided or set apart for that purpose. Violation of this section is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A mother's breastfeeding of her baby does not under any circumstance violate this section.

Fl Stat. § 800.04. Lewd, lascivious, or indecent assault or act upon or in presence of child

A person who:

(1) Handles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner;

(2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;

(3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or

(4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years,

without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section. A mother's breastfeeding of her baby does not under any circumstance violate this section.

Fla. Rule of Criminal Procedure Rule 3.670 Rendition of Judgment

If the defendant is found guilty, a judgment of guilty and, if the defendant has been acquitted, a judgment of not guilty shall be rendered in open court and in writing, signed by the judge, filed, and recorded. However, the judge may withhold an adjudication of guilt if the judge places the defendant on probation.

When a judge renders a final judgment of conviction, withholds adjudication of guilt after a verdict of guilty, imposes a sentence, grants probation, or revokes probation, the judge shall forthwith inform the defendant concerning the rights of appeal therefrom, including the time allowed by law for taking an appeal.

32 C.F.R. Pt. 41 App. A Part 2 A2.b

Unless separation is mandatory, the potential for rehabilitation and further useful military service shall be considered by the Separation Authority and, where applicable, the Administrative Board. If separation is warranted despite the potential for rehabilitation, consideration should be given to suspension of the separation, if authorized.

32 C.F.R. Pt. 41 App. A. Part 2 A.2.d:

The following factors may be considered on the issue of retention or separation, depending on the circumstances of the case:

(1) The seriousness of the circumstances forming the basis for initiation of separation proceedings, and the effect of the member's continued retention on military discipline, good order, and morale.

(2) The likelihood of continuation or recurrence of the circumstances forming the basis for initiation of separation proceedings.

(3) The likelihood that the member will be a disruptive or undesirable influence in present or future duty assignments.

(4) The ability of the member to perform duties effectively in the present and in the future, including potential for advancement or leadership.

(5) The member's rehabilitative potential.

(6) The member's entire military record.

(a) This may include:

1 Past contributions to the Service, assignments, awards and decorations, evaluation ratings, and letters of commendation;

2 Letters of reprimand or admonition, counseling records, records of nonjudicial punishment, records of conviction by court-martial and records of involvement with civilian authorities; and

3 Any other matter deemed relevant by the Board, if any, or the Separation Authority, based upon the specialized training, duties, and experience of persons entrusted by this part with

recommendations and decisions on the issue of separation or retention.

32 C.F.R. § 700.802 Responsibility.

(a) The responsibility of the commanding officer for his or her command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his or her responsibility. While the commanding officer may, at his or her discretion, and when not contrary to law or regulations, delegate authority to subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of his or her continued responsibility for the safety, well-being, and efficiency of the entire command.

(b) A commanding officer who departs from his or her orders or instructions, or takes official action which is not in accordance with such orders or instructions, does so upon his or her own responsibility and shall report immediately the circumstances to the officer from whom the prior orders or instructions were received. Of particular importance is the commanding officer's duty to take all necessary and appropriate action in self-defense of the command.

SECNAVINST 1910.4B Part 6 to enclosure (2) ¶2c(1) page 6-7

If the Board finds a preponderance of evidence does not support one or more of the reasons for separation alleged and recommends retention the separation authority cannot separate the servicemembers for that alleged reason.

SECNAVINST 1910.4B Part 1 to enclosure (2) ¶K1a(4)

page 1-26

Civilian conviction

(a) Conviction by civilian authorities or action taken that is tantamount to a finding of guilty, including similar adjudications in juvenile proceedings, when the specific circumstances of the offense warrant separation, and the following conditions are present:

1 A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial (reference (r)); or

2 The sentence by civilian authorities includes confinement for 6 months or more without regard to suspension or probation.

(b) Separation processing may be initiated whether or not a servicemember has filed an appeal of a civilian conviction or has stated an intention to do so. Execution of an approved separation should be withheld pending outcome of the appeal or until the time for appeal has passed, but the member may be separated before final action on the appeal upon request of the member or upon direction of the Secretary of the Navy.

SECNAVINST 1910.4B. ¶ 3a of part 2 of enclosure 2 page 2-3

3. Limitations on Separation Actions. A member may not be separated on the basis of the following:

a. Conduct that has been the subject of judicial proceedings resulting in the acquittal or action having the effect thereof except in the

following circumstances:

(1) When such action is based upon a judicial determination not going to the guilt or innocence of the respondent; or

(2) When the judicial proceeding was conducted in a State or foreign court and the separation is approved by the Secretary of the Navy; or

(3) When the acquittal from the judicial proceedings was based on a finding of not guilty only by reason of lack of mental responsibility. Servicemembers in this category normally shall be separated under Secretarial Plenary Authority (section P of part 1) unless separation for Disability (section D of part 1) is appropriate.

MILPERSMAN 3630610 SEPARATION OF ENLISTED PERSONNEL BY REASON OF MISCONDUCT - CIVILIAN CONVICTION

1. Basis. A member may be separated based on a conviction by civilian authorities, or action taken which is tantamount to a finding of guilt, including similar adjudications in juvenile proceedings, when:

   a. the specific circumstances of the offense warrant separation; and

   b. the member has committed an offense for which a punitive discharge would be authorized by the Manual for Courts-Martial for the same or a closely related offense; or

   c. the sentence includes confinement for 6

months or more without regard to suspension or probation.

MILPERSMAN 3640200(7). Administrative Board

Procedure Letter (ABPL)

From: Commanding Officer,
To: (rate, name, USN(R,-R,TAR), SSN)
Subj: ADMINISTRATIVE BOARD PROCEDURE LETTER (ABPL)

Ref: (a) MILPERSMAN Chapter 36

1. Per reference (a), you are being considered for an administrative separation from the naval service by reason of (list all reasons as indicated in MILPERSMAN Chapter 36 for which SNM is eligible for processing e.g.; misconduct, homosexual conduct, defective enlistment and induction - fraudulent entry into the naval service, etc. (as appropriate)) as evidenced by (specifics of basis for separation: e.g.; misconduct - commission of a serious offense as evidenced by CO's NJP 12 DEC 94 for Violation of UCMJ Article 128 (assault consummated by battery), misconduct - drug abuse as evidenced by all drug incidents in your current enlistment, homosexual conduct as evidenced by member engaging in, attempting to engage in, or soliciting another to engage in homosexual acts, and defective enlistment and inductions - fraudulent entry into the naval service by failing to reveal your civilian involvement).

2. If separation is approved it will result in (check one or more of the following):
( ) discharge or suspended discharge
( ) release from active duty to a reserve component
( ) transfer from Selected Reserve to the Individual Ready Reserve (IRR)

( ) release from custody or control of the U. S. Navy
( ) other form of separation (specify)
3. The least favorable characterization of service in your case is Other Than Honorable.
4. You are entitled to the following rights:
a. To consult with counsel qualified under Article 27(b) of the UCMJ. You may consult with civilian counsel retained at your own expense. (Nonlawyer counsel may be appointed as determined by commanding officer.)
b. To submit statements to the administrative board or the separation authority in lieu of a hearing.
c. To obtain copies of documents that will be forwarded to the Separation Authority supporting the basis for the proposed separation. (Classified documents will be summarized in unclassified form.)
d. To request an Administrative Board.
e. To representation at the Administrative Board by qualified counsel.
f. To representation at the Administrative Board by civilian counsel at your own expense.
5. If you commence a period of unauthorized absence after receiving this notice, or fail to respond, all your above rights will be considered waived and separation processing will continue in your absence.
6. This letter of notification supersedes any previously issued letter of notification.

_____

signature of commanding officer or
person with by direction authority

I acknowledge receipt of the above letter of notification.

_____

respondent's signature/date

Note that the following must be included in the above letter of notification if applicable:

For Members who are Reservists not on Active Duty: You are advised that separation proceedings in your case will be suspended for a period of 30 days from the date this notice is delivered to you personally or received at your designated mailing address in order to give you a reasonable opportunity to exercise the rights set forth herein. Failure to respond will constitute a waiver of all rights and processing may continue in your absence. If your separation involves transfer to the IRR, you are advised that the characterization of service upon transfer to the IRR also will constitute the tentative characterization of service upon discharge at the completion of the naval service obligation, unless you take affirmative action to affiliate with a drilling unit of the Selected Reserve; and you participate satisfactorily as a drilling member of the Selected Reserve for a period of time which, when added to any prior satisfactory service during this period of obligated service, equals the period of obligated service. If you submit evidence of completion of the above, the Separation Authority may assign a more favorable characterization of service. If you do not submit such evidence, the characterization of service is the same as the characterization of service upon transfer from active duty or the Selected Reserve to the IRR.

For Members in Civil Confinement: You are advised that separation proceedings in your case will be suspended for a period of 30 days from the date this notice is delivered to you personally or received at your confinement address in order to give you a reasonable opportunity to exercise the rights set forth herein. Failure to respond will constitute a waiver of all rights and processing may continue in your absence. If you are eligible and have elected an Administrative Board, and

you are unable to make arrangements which would allow you to appear in person before the Board, the proceedings will continue in your absence; in this event, however, you may be represented before the Board by your counsel. (Insert name, address, and telephone number of counsel) has been appointed your military counsel for consultation and/or representation for this action.

For Members Subject to Reimbursement: You are advised that you may be subject to a reimbursement requirement for recoupment of advance education assistance costs, bonuses, or special pays.

For Members who Refuse to Transfer to the Fleet Reserve/Retired List: You are advised that by your refusing to transfer to the Fleet Reserve/Retired List you are subject to separation with no retained/retired pay or benefits.

Supreme Court, U.S.
FILED
APR 25 2001
OFFICE OF THE CLERK

(3)

No. 00-1103

In the Supreme Court of the United States

MICHAEL D. STRICKLAND, PETITIONER

v.

RICHARD DANZIG, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
ANTHONY J. STEINMEYER
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

20pp

QUESTION PRESENTED

Whether petitioner could satisfy the equitable standards for bringing an action seeking an injunction ordering the Navy to invalidate his discharge and reinstate him in his military position, without first attempting to make use of the avenues for review of a discharge offered by the military.

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In the Supreme Court of the United States

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MICHAEL D. STRICKLAND, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 235 F.3d 1339 (Table). The opinion of the district court (Pet. App. 4-50) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2000. The petition for a writ of certiorari was filed on January 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former Navy petty officer, brought this action challenging his administrative "General Discharge under Honorable Conditions." The district court

granted summary judgment to respondents and dismissed the suit. Pet. App. 51-53. The court of appeals dismissed his appeal. *Id.* at 2-3.

1. Before his discharge, petitioner had served in the Navy for 17 years. On March 30, 1998, he was arrested by the Jacksonville, Florida police on charges of lewd and lascivious acts in the presence of a child, a second degree felony under state law. Petitioner was charged with having walked up to a woman and her children while they were seated in a car, with his penis exposed and masturbating. Petitioner contends that he had merely been shaking sand out of his shorts in a private area near a beach. Petitioner pleaded *nolo contendere* to a charge of indecent exposure, a misdemeanor. He was placed on 12 months' probation, fined $1,000, required to complete 50 hours of community service, and ordered to have no unsupervised contact with children. Pet. App. 5-6.

Upon receiving a report of the incident, the Navy Family Advocacy Program at Naval Station Mayport, Florida, presented petitioner's case to a review committee under Navy regulations. Pet. App. 7. That committee determined that the case was one of child sexual abuse and forwarded its determination to the Bureau of Naval Personnel. The Bureau in turn notified petitioner that he was being considered for administrative separation "by reason of 'misconduct due to a civilian conviction' and 'misconduct due to commission of a serious offense.'" *Id.* at 8. At petitioner's request, an administrative board was convened and military counsel was appointed for him. After a hearing, the board found misconduct but recommended that he nonetheless be retained in the Navy. *Id.* at 8, 10.

The board's findings and recommendations were reported to the Chief of Naval Personnel by petitioner's

former commanding officer, who concurred with the recommendations. Pet. App. 10. The Chief of Naval Personnel, however, disagreed with the recommendations and forwarded the case to the Assistant Secretary of the Navy for a determination. *Id.* at 11. The Assistant Secretary concurred with the Chief of Naval Personnel and ordered that petitioner be separated with a "General Discharge (Under Honorable Conditions)." *Ibid.* Petitioner's unit was ordered to discharge him by June 28, 1999. *Id.* at 12.

2. Petitioner filed suit in district court, seeking to enjoin the Navy from discharging him. The district court initially issued a temporary restraining order (TRO) prohibiting the Navy from discharging petitioner. Pet. App. 12. The court ultimately extended the TRO until August 9, 1999. *Ibid.* After that time, petitioner's discharge was held in abeyance by agreement of the parties until the district court ruled on the case. On January 12, 2000, after having held a hearing, the district court issued an order denying petitioner's motion for a preliminary injunction and granting summary judgment to respondents. *Id.* at 51-53. We are informed that petitioner was discharged on February 3, 2000.

The district court applied the substantive standards governing review of an internal military decision set forth in the Fifth Circuit's decision in *Mindes* v. *Seaman*, 453 F.2d 197 (1971). Under those standards, the availability of such review depends on (1) "[t]he nature and strength of the plaintiff's challenge to the military determination," (2) "[t]he potential injury to the plaintiff if review is refused," (3) "[t]he type and degree of anticipated interference with the military function," and (4) "[t]he extent to which the exercise of military

expertise or discretion is involved." *Id.* at 201; see Pet. App. 28-29.

With respect to the first factor, the district court extensively analyzed and rejected petitioner's several claims that the procedures used in his separation violated Navy regulations. Pet. App. 30-35. The court also rejected petitioner's claim that his separation violated principles of fundamental fairness because he had pleaded *nolo contendere* to the state criminal charge in reliance on a statement by his ship's legal officer that he would not be processed for separation if he did so. The court held that petitioner's contention, which was similar to a claim of estoppel against the government, failed because Navy regulations "clearly indicate[] that [petitioner] would be processed for separation for a civilian conviction" and because there was no evidence that anyone had "deliberately misled" petitioner. *Id.* at 39. Finally, the court rejected petitioner's procedural due process claim on the ground that petitioner had no liberty or property interest in his military position. *Id.* at 41.

With respect to the second *Mindes* factor, the court held that "the harm to [petitioner], although significant, is not irreparable." Pet. App. 43. The court relied on the existence of further internal Navy remedies that were available to petitioner, such as review before the Board for Correction of Naval Records (BCNR). The court explained that "[i]f an error were found sufficient to warrant correction of [petitioner's] misconduct processing and discharge, he could be made whole by later rulings of the BCNR or in a court." *Id.* at 43-44. See also *id.* at 44-46.

With respect to the third and fourth *Mindes* factors, the court found "that the potential interference with [respondents'] ability to efficiently manage Naval per-

sonnel is great when a court interferes in a decision to separate enlisted personnel." Pet. App. 44; see also *id.* at 47 ("[A]n involuntary separation from the military has as its primary focus the preservation of the integrity and fighting fitness of the armed forces."). The court found that the fourth factor "balances against [petitioner], because this case clearly involves military discretion exercised in matters of military personnel moral[e] and discipline." *Id.* at 44.

3. The court of appeals affirmed in an unpublished per curiam decision. Applying the *Mindes* test for justiciability, which includes both the substantive standards applied by the district court and procedural elements concerning whether the servicemember has invoked internal military remedies, the court stated that dismissal for lack of jurisdiction was required because petitioner had "failed to exhaust his administrative remedy before the Board for Correction of Naval Records." Pet. App. 2. The court also stated that petitioner's request for an injunction barring his separation from the Navy is moot, because "[petitioner] already has been discharged from the service." *Id.* at 3.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner's principal argument (Pet. 8) is that the court of appeals' decision conflicts with this Court's decision in *Darby* v. *Cisneros*, 509 U.S. 137 (1993). This Court held in *Darby* that, in cases brought under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, the courts may apply the traditional doctrine of exhaustion of administrative remedies "only when expressly required by statute or when an agency rule

requires appeal before review and the administrative action is made inoperative pending that review." 509 U.S. at 154. The Court relied for that conclusion on Section 10(c) of the APA, which provides that "agency action otherwise final is final for the purposes of [obtaining judicial review] whether or not there has been presented or determined an application * * *, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. 704. In this case, the Navy has not required by rule that sailors must bring their claims to the BCNR or other internal review mechanisms before their separation is final, and it has not provided that separation of a sailor from the Navy will be "inoperative" until any such review is completed.

a. *Darby* established that the general doctrine of exhaustion of administrative remedies applies in APA cases only under the circumstances specified in Section 10(c). But this Court noted in *Darby* that "federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review." 509 U.S. at 146. One such doctrine is the traditional equitable rule that federal courts must weigh the public interest and consider the hardship that an injunction would impose before granting relief. That rule has particular force in cases involving the military, in which interference—especially premature interference—by a court can implicate serious separation of powers concerns.

For example, in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 329-330 (1982), plaintiffs sued to enjoin the Navy from discharging wastes in violation of the Clean Water Act. This Court held that a court "should pay particular regard for the public consequences in

employing the extraordinary remedy of injunction," and it noted that "[a]n injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Id.* at 312 (quoting *Cavanaugh* v. *Looney*, 248 U.S. 453, 456 (1919)). Moreover, the Court relied on the existence of an alternative non-judicial remedy—the possibility that the Navy could apply for and obtain a permit for its discharges—in holding that the district court was not required to issue an injunction against the Navy. See also *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542-544 & n.8 (1987) (noting that the existence of alternative means to obtain statutory goal militated against injunction); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944) ("A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances."). Those principles do not conflict with *Darby*, and they fully justify the refusal by the courts below to interfere with military discipline and personnel actions while internal military avenues of relief remain available. Cf. *Clinton* v. *Goldsmith*, 526 U.S. 529, 537-540 (1999) (holding injunctive relief under the All Writs Act unavailable because of existence of alternative avenues of relief).

When a servicemember seeks to obtain an injunction in a matter affecting the relationship between the servicemember and military superiors, there is a paramount public interest in avoiding judicial interference —especially premature judicial interference—in internal military affairs. That public interest rests both on the public interest in the military's ability to maintain discipline and thereby serve its function of protecting the Nation's security and on the separation of powers concerns that are necessarily implicated by undue

judicial intrusion into internal military affairs. Accordingly, the public interest in avoiding an injunction in cases like this is at its apex. Applying the traditional equitable principles recognized in cases such as *Romero-Barcelo*, a court therefore would ordinarily abuse its discretion in issuing an injunction—and, therefore, in entertaining a suit for an injunction—when the servicemember's alleged injury can be redressed by internal military means.[1]

i. The military services play a crucial role in protecting the national security. "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). Having developed as a result of "centuries of experience," *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983), the "military exigencies" that require such discipline are "as powerful now as in the past." *Schlesinger*, 420 U.S. at 757. Indeed, "[t]he essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986) (quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 92 (1953)). In short, "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." *Chappell*, 462 U.S. at 300.

The "heirarchical structure of discipline and obedience to command" is "unique in its application to the military establishment and wholly different from civilian patterns." *Chappell*, 462 U.S. at 300; see also *Orloff*, 345 U.S. at 94 ("The military constitutes a specialized community governed by a separate discipline from that

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[1] The same principles apply *a fortiori* to the issuance of temporary or preliminary relief in such cases. See note 4, *infra*.

of the civilian."). Because undue outside intervention in the system of military command risks compromising that structure, the judiciary must be "scrupulous not to interfere with legitimate [military] matters." *Orloff*, 345 U.S. at 94. "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." *Chappell*, 462 U.S. at 300.

ii. In addition to the special needs of military discipline, core constitutional separation-of-powers principles also require courts to exercise exceptional caution before intervening in internal military matters. The Constitution grants plenary authority to Congress "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cls. 12-14. It also provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." *Id.* Art. II, § 2, Cl. 1. Because such broad authority over military matters and personnel is entrusted to Congress and the President—not to the courts—"[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff*, 345 U.S. at 94. Indeed, "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

iii. Because of the exceptional dangers posed by undue—and, in particular, premature—judicial intervention in military personnel matters, the public interest, which is always a factor of overriding importance in exercising equity jurisdiction, generally prohibits courts from issuing injunctions in cases in which internal military remedies are available to address the plaintiff servicemember's complaint. That does not mean that courts have no role to play in enforcing constitutional and statutory requirements applicable to servicemembers. But "judicial inquiry into, and hence intrusion upon, military matters," *United States* v. *Stanley*, 483 U.S. 669, 682 (1987), should be avoided in cases in which a servicemember has alternative, intra-service remedies available.

b. This case provides a typical instance in which judicial intrusion into military matters is impermissible. Petitioner has made no effort to avail himself of at least two administrative processes—the BCNR and the Discharge Review Board—that could have remedied any violation of law that took place in his separation from the Navy. Indeed, these expert bodies offer not only the expertise in military matters not possessed by a district court, but also the ability to develop an administrative record that would likely assist in any ultimate judicial review sought by petitioner. Most importantly, however, the investigation and resolution of petitioner's claims by those bodies would not be an unwanted and potentially damaging interference with military discipline, but would instead be an invocation of an available procedure that is *within* the structure of internal military remedies that Congress has specifically provided.

i. First, the BCNR has statutory authority to "correct any military record * * * when [it] considers it necessary to correct an error or remove an injustice."

10 U.S.C. 1552(a)(i). A claimant or the claimant's heir may "file[] a request for the correction within three years after he discovers the error or injustice," although the Board may excuse failure to satisfy that limitations period "if it finds it to be in the interest of justice." 10 U.S.C. 1552(b).[2] The function of the BCNR is to determine "the existence of error or injustice," and when appropriate, "to make recommendations to the Secretary" of the Navy. 32 C.F.R. 723.2(b). The BCNR has the authority to consider claims of "constitutional, statutory and/or regulatory violations." 32 C.F.R. 723.3(e)(4). The Secretary of the Navy, upon receipt of a BCNR recommendation, is empowered to "direct such action as he or she determines to be appropriate." 32 C.F.R. 723.7(a). The Secretary thus may order reinstatement, back pay, promotion, or any other relief he finds "appropriate." See *Goldsmith*, 526 U.S. at 538;[3] *Chappell*, 462 U.S. at 301-303.

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[2] Petitioner accordingly would have three years from the date of his discharge in February 2000 to file a claim before the BCNR.

[3] *Clinton* v. *Goldsmith*, *supra*, presented the question whether the Court of Appeals for the Armed Forces, acting in aid of its jurisdiction over appeals from some courts-martial, had jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to enjoin the President and other officials from dropping an officer from the rolls. During the oral argument in *Goldsmith*, the government stated that "under this Court's decision in *Darby* v. *Cisneros*, unless there is a specific statutory or regulatory requirement of exhaustion, the servicemember need not, before bringing an APA action, exhaust * * * the provided administrative remedy, such as the BCMR. He can do it, but he can also make a challenge to the actual decision to drop him from the rolls." Tr. at 11, *Clinton* v. *Goldsmith*, *supra* (No. 98-347). The Court, however, recognized in *Darby* the continued application of "other prudential doctrines of judicial administration to limit the scope and timing of judicial review" in APA actions. 509 U.S. at 146. For the reasons given in this brief,

Second, the Discharge Review Board also has broad powers under 10 U.S.C. 1553. While the Discharge Board may not reinstate a discharged or dismissed serviceman, it is authorized to "change a discharge or dismissal, or issue a new discharge, to reflect its findings." 10 U.S.C. 1553(b). See also 32 C.F.R. 724.202(a)(2). The function of the Discharge Board is, *inter alia*, to correct any "injustice or inequity in the discharge issued." 32 C.F.R. 724.203(b). Such review is conducted on the basis of military records and "such other evidence as may be presented to the board," including evidence that may be presented "in person or by affidavit." 32 C.F.R. 724.202(a)(3). Aggrieved persons may be represented by counsel or by other persons. *Ibid.* The jurisdiction of the Discharge Review Board includes all discharges other than those pursuant to general court-martial. 32 C.F.R. 724.107. A

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longstanding equitable doctrines governing the issuance of injunctions ordinarily preclude courts from granting such relief so long as internal military remedies are available.

In its opinion in *Goldsmith*, the Court noted that one reason that All Writs Act jurisdiction was not available to the plaintiff was that the plaintiff had alternative remedies available—either "to present his claim to the Air Force Board for Correction of Military Records," 526 U.S. at 538, or to the federal courts either on APA review of the Board's decisior or in a suit for money damages under the Tucker Act, *id.* at 539-540. The Court thus recognized and relied upon the fact that judicial review is available after a decision of the Board of Corrections, a proposition that is entirely consistent with the position taken in this brief. It is noteworthy that the Court did not suggest that a district court could exercise jurisdiction over the decision to drop the plaintiff from the rolls prior to a decision by the Board of Corrections; nothing in *Goldsmith* accordingly suggests that a district court could properly exercise jurisdiction over the analogous decision in this case to discharge petitioner.

servicemember has up to 15 years to apply for such review. 32 C.F.R. 724.205(b). Thus, the Discharge Review Board could change petitioner's discharge to a fully honorable discharge if the law or equities in his case so required.

ii. It is worth emphasizing that the facts that internal military remedies may take some time to operate, and that petitioner may in the meantime be separated from the service, do not warrant permitting him to proceed directly to district court. In *Romero-Barcelo*, for example, the alternative remedy on which the Court relied (the ability of the military to apply for and obtain a discharge permit) would not have remedied the existing violation of law as quickly as a simple order by the district court, perhaps even as a matter of temporary or preliminary relief, to the military to cease its discharges. Nonetheless, the Court held that the alternative remedy may be sufficient to warrant the court's withholding of injunctive relief. Here, the public interest in avoiding undue intrusion by the judiciary in internal military discipline is of overarching importance. So long as internal military remedies are available to petitioner, the fact that their invocation may take some time (as, of course, would district court litigation) does not justify a court's exercise of its equity jurisdiction.[4]

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[4] It is difficult to conceive of circumstances in which a district court would be warranted in granting a temporary restraining order or preliminary injunction in a federal military personnel matter. Such forms of preliminary relief are necessarily tentative, and the fact that they are subject to change later in the litigation serves to make them particularly threatening to the ability of the military command structure to administer military personnel in

c. In any event, further review in this case is unwarranted. The Fifth Circuit's decision is unpublished, and it therefore does not have full precedential effect even in the Fifth Circuit. See 5th Cir. R. 47.5.4. Petitioner

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the interests of the Nation's security.

In a case involving the discharge of a federal civilian employee, this Court has held that a lower court would be "quite wrong in routinely applying * * * the traditional standards governing more orthodox 'stays.'" *Sampson* v. *Murray*, 415 U.S. 61, 83-84 (1974). To obtain such relief, a federal civilian employee "at the very least must make a showing of irreparable injury sufficient in kind and degree to override the[] factors cutting against the general availability of preliminary injunctions in Government personnel cases." *Id.* at 84. This Court "ha[s] held that an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however severely they may affect a particular individual." *Id.* at 92 n.68. It follows *a fortiori* that temporary or preliminary relief in the even more sensitive context of personnel actions affecting members of the military are likely to be unavailable. See, *e.g.*, *Guitard* v. *United States Secretary of Navy*, 967 F.2d 737, 742 (2d Cir. 1992) (holding that *Sampson* "applies with as much or greater force in the case of a military discharge"); *Guerra* v. *Scruggs*, 942 F.2d 270, 274 (4th Cir. 1991) (holding that "*Sampson*'s higher requirement of irreparable injury should be applied in the military context given the federal courts' traditional reluctance to interfere with military matters"); *Hartikka* v. *United States*, 754 F.2d 1516, 1518 (9th Cir. 1985) (holding that *Sampson* requires the plaintiff to "make a much stronger showing of irreparable harm than the ordinary standard for injunctive relief"); *Chilcott* v. *Orr*, 747 F.2d 29, 34 (1st Cir. 1984) (holding that "the prospect of a general discharge under honorable conditions is not an injury of sufficient magnitude to warrant an injunction"). In sum, neither the irreparable injury nor the public interest prongs of the familiar four-part test for temporary injunctive relief will be satisfied in an action seeking to enjoin a military personnel decision.

claims (Pet. 9) that the decision in this case conflicts with *Dowds* v. *Clinton*, 18 F.3d 953 (D.C. Cir. 1994) (Table), but that decision too is unpublished, and it likewise lacks precedential effect. See D.C. Cir. R. 28(c) ("Unpublished orders or judgments of this court, including explanatory memoranda and sealed opinions, are not to be cited as precedent."). Accordingly, there is no conflict in the circuits.[5]

2. Petitioner claims (Pet. 10) that the court of appeals erred in finding that his claim for a permanent injunction precluding his discharge was moot. Petitioner had been discharged by the time the court of appeals issued its decision. He offers no reason why his claim for a permanent injunction prohibiting his discharge was therefore not moot. As petitioner notes (Pet. 11), his claim for reinstatement was not moot. But the court of appeals dismissed his appeal with respect to that claim because of his failure to seek a remedy before the BCNR, not because of mootness. The court of appeals' mootness holding was accordingly correct and does not warrant further review.

3. Petitioner's remaining contentions are that the district court erred in its analysis of petitioner's claim that his discharge violated the Due Process Clause

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[5] Two other appellate decisions have addressed similar or related issues, but they also were unpublished. *Robertson* v. *United States*, 145 F.3d 1346 (10th Cir. 1998) (Table), cert. denied, 525 U.S. 879 (1999); *Ostrow* v. *Secretary of the Air Force*, 48 F.3d 562 (D.C. Cir. 1995) (Table). The reported district court decisions are split. Compare *Saad* v. *Dalton*, 846 F. Supp. 889, 891 (S.D. Cal. 1994) ("[r]eview of military personnel actions * * * is a unique context with specialized rules limiting judicial review"), with, *e.g.*, *Crane* v. *Secretary of the Army*, 92 F. Supp. 2d 155, 162 (W.D.N.Y. 2000) (reviewing merits of discharge case despite availability of internal military remedies).

(Pet. 12-18) and that his discharge violated the APA because it was arbitrary and capricious (Pet. 18-22) and not supported by substantial evidence (Pet. 23-25). Those fact-bound contentions were not addressed by the court of appeals, and they are therefore not ripe for review by this Court. Petitioner is free to press those claims on their merits before the BCNR, which has the authority to consider claims of "constitutional, statutory and/or regulatory violations." 32 C.F.R. 723.3(e)(4). He may then seek judicial review of the resolution of those claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
ANTHONY J. STEINMEYER
MARK W. PENNAK
Attorneys

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NO. 00-1103

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2000 TERM

MICHAEL D. STRICKLAND
Petitioner

v.

RICHARD DANZIG, Secretary of the Navy, VICE ADMIRAL DANIEL T. OLIVER, Chief of Naval Personnel, COMMANDER RICHARD LOTH, Commanding Officer, Special Boat Unit Twenty-Two, LCDR R. E. MILLER, Officer in Charge, Personnel Support Detachment
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Reply Brief to Respondent's Opposition to Petition for Writ of Certiorari

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John B. Wells
LA bar #23970
Attorney for the Petitioner
317 Portsmouth Drive
Slidell, LA 70460-8429
504-641-1855

9pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fifth Circuit Erred in Dismissing Petitioner's Appeal for Failure to Exhaust Administrative Remedies.

II. Whether the Fifth Circuit Erred in Denying Injunctive Relief As Moot When Relief Would Mitigate the Damage Suffered By the Petitioner.

III Whether the Fifth Circuit Erred In Denying Relief In Light of Petitioner's Right to Due Process.

IV. Whether the Navy Can Arbitrarily and Capriciously Discharge Petitioner.

V. Whether the Navy Can Discharge Petitioner When the Decision Is Unsupported by Substantial Evidence.

VI. Whether the Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs.

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Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, 1994-SEP ARMY LAW. 3 (Sep. 1994) 2

Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix for Darby v. Cisneros*, 1997-FEB ARMY LAW. 3 (Feb. 1997) 2

STATEMENT OF THE CASE

The petitioner adopts and incorporates his statement of the case as delineated in the petition for certiorari. The petitioner does note, however, the following discrepancies in the statement of the case articulated in the Solicitor General's opposition.

In their brief for the respondents, the Solicitor General fails to note that the petitioner plead *nolo contendere* to a misdemeanor charge only after being assured by Navy officials that they supported this plea and would take no action to administratively separate him. The Solicitor General also failed to note that the state court withheld adjudication in this matter, which is not considered a conviction in the State of Florida.

The Solicitor General's statement of the case indicated that the administrative board found misconduct. Actually, the initial findings of the board were that no misconduct occurred. After findings were announced the government representative (recorder) argued off record that the findings must be changed. The crux of this argument was that the *nolo* plea was binding on the board and that they (the board) were not free to determine whether misconduct had occurred. The board had no legal advisor and accepted the argument of the government attorney.

ARGUMENT

In their brief for the respondents the Solicitor General incorrectly opines that the Fifth Circuit decision does not conflict with the decision of other Circuits or this Court's decision in *Darby v. Cisneros* 509 U.S. 137 (1993). In his petition, the petitioner noted that the Federal Circuit has held that a resort to the military corrections boards is permissive not mandatory. *Heisig v. United States*, 719 F.2d 1153, 1155 (Fed.Cir.1983). The disparity between the Circuits in this case is critical since it is the Federal Circuit and their subordinate court, the United States Court of Federal Claims who often review the actions of the military correction boards. To allow such divergent rulings to stand can result in absurd and inequitable results. This is especially true since the Federal Circuit, unlike the other circuits, has held that seeking relief at a military correction board does not toll the running of the statute of limitations or create a new cause of action based on the board's decision to deny relief. *Hurick v. Lehman* 782 F.2d 984, 987 (Fed. Cir. 1986).

Nor can it be said that the actions of the Fifth Circuit below are not ripe for review because the decision was non-precedential. This decision reaffirmed the already existing law in the Fifth Circuit, as delineated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) that administrative remedies must be exhausted.

Additionally, as noted in the petition for certiorari, the position of the respondents is inconsistent with the military's own commentators. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, 1994-SEP ARMY LAW. 3 (Sep. 1994); Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix for Darby v. Cisneros*, 1997-FEB ARMY LAW. 3 (Feb. 1997)

Thus contrary to the Solicitor General's assertion, a major conflict among the Circuits is evident.

The Solicitor General further relied upon an environmental case, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 329-330 (1982) for the proposition that the courts should be able to ignore *Darby*, especially in the military environment. *Weinberger* was an environmental case in which the Administrative Procedures Act (APA) did not come into play and does not control here. Additionally, the decision noted that other means were available to achieve the statutory goal and other means were available to protect property rights. *Id* at 312. Here no such alterative remedy exists. An appeal to the correction boards is permissive and does not allow for a stay of the discharge action. 10 U.S.C. § 1552. Since the statute does not require an appeal to the correction boards, the principles of *Darby* control.

Nor should the petitioner be forced to resort to the Navy Discharge Review Board (NDRB). As with the Board for Correction of Naval Records (BCNR), an application to the NDRB is permissive rather than mandatory. 10 U.S.C. § 1553. Additionally, the NDRB cannot provide the relief sought by petitioner. It's authority is limited to upgrading discharges and cannot restore the petitioner to active duty with back pay or grant him retirement benefits. 10 U.S.C. § 1553. Since the relief that could be granted is at best *de minimus*, resorting to this remedy would be futile.

Although the Solicitor General chose not to address the question of whether the deference to military authorities should be imputed to the field commanders or the headquarters staffs, they did assert that the public interest would be harmed by judicial interference into military personnel decisions and that judicial review gives rise to separation of powers concerns.

Every high school civics course teaches that along with separation of powers comes "checks and balances." These two basic tenets of our Constitution work hand in hand to ensure that no branch wields too much power. Here, the

Solicitor General argues that the Congress delegated unbridled powers to the Executive in governing the military. This is not the case. Both 10 U.S.C. § 1169 and the Administrative Procedures Act limit the power of the Executive branch in this matter. The former requires the military to comply with the regulations promulgated by the service Secretary (32 C.F.R. Pt. 41 App. A and SECNAVINST 1910.4 series). The latter allows for judicial review of decisions that are arbitrary and capricious, unsupported by substantial evidence and contrary to the Constitution and laws of the United States.

Nor can the government explain how relief granted by correction boards could be less intrusive than judicial review. If the government assertion is correct and the correction board can make Strickland whole, how will the military suffer from similar action ordered by judicial decree. Judicial review will act to provide guidance to the military correction boards and to the military headquarters staff to ensure that personnel decisions are rendered in accordance with the Constitution and laws of the United States. This will reduce the number of future controversies such as the instant case.

The Solicitor General did not address the fundamental unfairness of inducing Strickland to plead *nolo contendre* on one hand then discharging him for following that advice. This inequity cries out for immediate relief.

Strickland's discharge was irrational. It was a lose/lose proposition. Strickland suffered severe damage that is growing worse every day. The Navy lost a trained petty officer and his local command was forced to cover his loss without replacement. If judicial review can prevent this type of injustice, then all will benefit.

Additionally, this Court must resolve the lack of consistency between the Circuits concerning the applicability of *Darby* and whether resort to correction boards is required.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

John B. Wells
LA bar #23970
Attorney for the Petitioner
317 Portsmouth Drive
Slidell, LA 70460-8469
504-641-1855
504-649-1536 (fax)